STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0226

Bradley Wingate,
Appellant,

vs.

Metropolitan Airports Commission,
Respondent.

Filed August 19, 2019
Reversed and remanded
Cleary, Chief Judge

Hennepin County District Court
File No. 27-CV-18-562

David E. Schlesinger, Lucas J. Kaster, Nichols Kaster, PLLP, Minneapolis, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Cleary, Chief Judge; and Cochran, Judge.

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

CLEARY, Chief Judge

Appellant Bradley Wingate challenges the summary-judgment dismissal of his whistleblower claim against respondent Metropolitan Airports Commission (MAC). Wingate argues that the district court erroneously determined that there are no genuine

issues of material fact that could allow him to establish that MAC's failure to promote him to the rank of sergeant violated the Minnesota whistleblower act (MWA), Minn. Stat. § 181.932 (2018). Because we conclude that there is a material-fact dispute regarding whether MAC's justification for not promoting Wingate was pretextual, we reverse and remand.

FACTS

Wingate is a police officer in MAC's Airport Police Department (the department). After Wingate was hired and completed training in 2005, he was assigned as a patrol officer. Shortly thereafter, the department also hired Roby Desubijana as a police officer.

At a social gathering outside of work in 2010, Desubijana took photographs of other department officers present at the event; he then altered the images to depict homosexual pornography. Desubijana showed the images to several officers at work, including Wingate. A few weeks later, Desubijana took a photograph of Wingate changing clothes in the men's locker room at work. Wingate confronted Desubijana about the photograph, but Desubijana fled out of the locker room. Wingate later attempted to confront Desubijana by telephone, but Desubijana ignored him.

Wingate reported both incidents to his superiors. In response, Wingate and Desubijana attended a mediation meeting with two sergeants and a lieutenant. Wingate requested that the photograph of him in the locker room be deleted, and Desubijana was instructed to do so and to refrain from further inappropriate behavior.

Wingate received his 2010 performance evaluation soon after the meeting. The review included a "Not Achieved" rating in the "Communication" category and stated that

Wingate struggled to communicate effectively with his peers and supervisors. Wingate was later informed that this rating was based on his response to the Desubijana incidents. In December 2011, Wingate applied for and received a specialty assignment as MAC's liaison with the Drug Enforcement Administration (DEA) Task Force.

The following year, due to a sergeant vacancy, MAC initiated a promotion process. The sergeant-promotion process includes two phases. In the first phase, candidate scores are compiled from certain exercises that may include a panel interview, written work product review, and a first-line supervisor review. After the scores are calculated and weighted, the candidates are then ranked accordingly. The second phase is comprised of a "chiefs' interview," an interview with the chief of police and the two deputy chiefs of police. The chiefs determine the number of candidates who proceed to chiefs' interviews based upon the number of available positions and the scores from the initial phase.

Wingate applied for the sergeant promotion during the 2012 promotion process. After the first phase, another officer ranked first and Desubijana ranked second. The chiefs interviewed the top two candidates and ultimately promoted Desubijana. Shortly after the first promotion, another sergeant position became available, and the chief of police promoted the first-ranked candidate from the 2012 candidate list.

In July 2012, Wingate joined the department's Emergency Response Team (ERT). A few months later, Wingate and other members of the ERT, including Desubijana, traveled to Camp Dodge, Iowa for training. Prior to their departure, Lieutenant Keith Roediger, the commander of the ERT, emailed the group, informing them of "one very simple rule" on the team—"[w]hat happens on [ERT], stays on [ERT], especially when we

deploy to Camp Dodge . . . . [It's] like [V]egas-baby[,] what happens there stays there!" While at training, Desubijana photographed another team member in the shower. The incident was reported to the supervisors present, and as discipline, Desubijana was designated as the "sober driver" for the team's celebrations on the last night of training.

After returning to MAC later that month, Desubijana took a video of a sergeant in his towel in the department locker room. Desubijana posted the video to a private YouTube channel, which was accessible to other employees. The sergeant reported the incident to his supervisors, but Desubijana did not receive any discipline.

In November 2012, Desubijana initiated a conversation with Wingate's girlfriend on Facebook. After asking whether she was Wingate's girlfriend, Desubijana stated that Wingate was "a nice guy; yes, but there's a screw loose." A few weeks later, Wingate reported Desubijana's conduct to his supervisor, detailing all of the incidents involving Desubijana from the past few years. Wingate requested that his supervisor keep the conversation private, but his supervisor relayed Wingate's concerns to Deputy Chief Merlin Tolsma and another sergeant.

In July 2013, Wingate met with Deputy Chief Tolsma, who assured Wingate that he would investigate the matter further. Shortly thereafter, Deputy Chief Tolsma and another deputy chief of police met with Desubijana, and he admitted to the allegations. Desubijana received a five-day, unpaid suspension, with three days held in abeyance.

After learning of Desubijana's discipline and believing it to be insufficient, Wingate contacted his sister, an attorney. Following his sister's recommendations, Wingate reported his complaints to Human Resources (HR). HR initiated an internal affairs

investigation, which sustained the allegations against Desubijana, with the exception of the allegation that Desubijana targeted and defamed Wingate. Desubijana was suspended for an additional two days and was required to serve the three days previously held in abeyance.

In October 2013, another sergeant position became available. To fill the vacancy, the chiefs discussed whether to promote a candidate from the 2012 promotion list or to begin a new promotion process altogether. Later that month, MAC initiated a new promotion process. Wingate applied for the promotion, and after the first phase, he was ranked third. The top three candidates received a chiefs' interview, and the first-ranked candidate received the promotion. After a second sergeant position became available a few months later, the chiefs decided against re-posting the position and instead promoted the second-ranked candidate.

In late 2014, Chief of Police Mike Everson, being newly-promoted, decided to generate a new promotion list in anticipation of a vacancy for a sergeant position. In making this decision, Chief Everson described his goal of increasing diversity within the department. Wingate again applied for the promotion, and after the initial phase, he ranked fifth. At the time, the chiefs did not conduct any interviews or make any promotions. But when a sergeant position became available in 2016, the chiefs conducted interviews of the top three candidates from the 2014 list. A female officer was promoted to sergeant, and as two sergeant positions became available in the next few months, the chiefs promoted the other two candidates who had participated in the chiefs' interviews.

In January 2017, Wingate was scheduled to rotate out of his position with the DEA. Wingate sought to extend his position with the DEA for one year, and Chief Everson granted him a six-month extension in that role. In response, Wingate contacted Chief Everson and informed him that he believed that he was being retaliated against for his complaints against Desubijana. During their conversation, Chief Everson advised Wingate to "move on," and that the issues with Desubijana were behind them.

Wingate returned to his patrol-officer position in July 2017. That same month, two sergeant positions became available. Wingate applied for the promotion, and after the initial phase, he ranked first out of all the candidates. Because two sergeant positions needed to be filled, the chiefs decided to interview five candidates, including Wingate. The chiefs promoted two candidates to the vacant sergeant positions and announced that the two other candidates would remain in consideration for future openings. Wingate, however, was removed from the promotion list.

On January 9, 2018, Wingate filed a complaint against MAC, alleging retaliation in violation of the MWA. MAC moved for summary judgment, asserting that Wingate failed to establish a genuine issue of material fact. The district court granted MAC's motion, determining that although Wingate established a prima facie case of retaliation under the MWA, he failed to submit evidence sufficient to demonstrate that MAC's articulated reason for its promotion decisions was pretextual. This appeal follows.

D E C I S I O N

We review summary judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We "determine whether the

district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* The evidence is viewed 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). A genuine issue of material fact exists if a rational fact-finder, when considering the record as a whole, could find for the non-moving party. *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

Under the MWA:

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) the employee . . . in good faith, reports a violation, suspected violation, or planned violation of any federal or state law . . . or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official . . . .

Minn. Stat. § 181.932, subd. 1.

When analyzing a whistleblower claim, Minnesota courts apply the three-step burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Cokley v. City of Ostego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). The *McDonnell Douglas* burden-shifting framework requires the plaintiff to establish a prima facie case, the employer to articulate a legitimate, nonretaliatory reason for its action, and the plaintiff to demonstrate that the articulated reason is pretextual. 411 U.S. at 802-04, 93 S. Ct. at 1824-25. To establish a prima facie case under the MWA, an employee must present evidence to show that (1) the employee

engaged in statutorily protected conduct, (2) the employee suffered an adverse employment action, and (3) there is a causal connection between the adverse action and the employee's involvement in the statutorily protected conduct. *Coursolle*, 794 N.W.2d at 657. The parties do not dispute that Wingate engaged in protected conduct and suffered an adverse employment action.

I. The issue of causal connection is not properly before this court.

In its response brief, MAC argues that the district court erred in determining that Wingate established a prima facie case of retaliation under the MWA because he presented no evidence of a causal connection between his complaints and any promotion decision. Minn. R. Civ. App. P. 106 provides, "After an appeal has been filed, respondent may obtain review of a judgment or order entered in the same underlying action that may adversely affect respondent by filing a notice of related appeal." A respondent is barred from presenting issues not raised by a notice of related appeal. *Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986). But a respondent is not required to file a notice of related appeal where the respondent "advances on appeal an argument that was presented to, but was not ruled on by, the district court and is an alternative ground that supports affirmance of a judgment or order that was entered in respondents' favor." *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 332 (Minn. 2010).

Here, the district court ruled on the issue of causal connection, and MAC was therefore required to file a notice of related appeal. *See City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996) ("Even if the judgment is ultimately in its favor, a party must file a notice of [related appeal] to challenge

the district court's ruling on a particular issue."); *see also Aase v. Wapiti Meadows Cmty. Tech.*, 832 N.W.2d 852, 857 n.1 (Minn. App. 2013) (declining to consider respondent-employer's argument that appellant-employee failed to establish a prima facie case of discrimination because the respondent-employer failed to file a notice of related appeal), *review denied* (Minn. Aug. 6, 2013). Because the district court ruled adversely to MAC on the issue of causal connection and MAC failed to file a notice of related appeal, the issue is not properly before this court, and we decline to consider it.

II. The district court erred in determining that Wingate failed to demonstrate that MAC's articulated reason for its promotion decision was pretextual.

Once an employer articulates a legitimate, nondiscriminatory reason for the adverse employment action, the burden returns to the employee to demonstrate that the articulated reason is a pretext for discrimination. *Ward v. Emp. Dev. Corp.*, 516 N.W.2d 198, 202 (Minn. App. 1994), *review denied* (Minn. July 8, 1994). A plaintiff may fulfill this prong of *McDonnell Douglas* "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence." *Sigurdson v. Isanti Cty.*, 386 N.W.2d 715, 720 (Minn. 1986) (quotation omitted). "But to prove pretext, the employee must do more than show that the employment action was ill-advised or unwise, but rather must show that the employer has offered a phony excuse." *Meads v. Best Oil Co.*, 725 N.W.2d 538, 542-43 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Feb. 20, 2007).

Evidence of pretext may include the same evidence offered to establish the prima facie claim. *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002). But the

burden of establishing pretext requires more substantial evidence than that required to establish a prima facie case "because unlike evidence establishing the prima facie case, evidence of pretext and discrimination is viewed in light of the employer's justification." *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1111 (8th Cir. 2001); *see also Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 546 (Minn. 2001) ("In some cases, sufficient evidence may consist of only the plaintiff's prima facie case plus evidence that the employer's proffered reason is untrue. In other cases, more may be required.").

MAC's articulated reason for not promoting Wingate was that Wingate was "too rigid and black and white without a sufficient grasp of the big picture role of a manager within [the department] and the larger organization of the MAC." Wingate counters that several circumstances demonstrate that this reason was pretextual: (1) MAC's subjective promotion process; (2) Wingate's continued engagement in protected activity; (3) the 2012 ranking list; (4) MAC's decision to repost the decision in 2014; (5) Wingate's positive performance history; (6) comments made by Wingate's supervisors; (7) MAC's promotion patterns between 2012 and 2017; and (8) a similar retaliation complaint. We address each argument in turn.

Subjective Promotion Process

Wingate first argues that MAC's promotion process supports a reasonable inference of pretext because the ultimate promotion decision is left to the subjective perception of the chief of police. When determining whether there is a material-fact issue in regard to pretext, this court may consider an employer's lack of objective hiring criteria. *Meads*,

725 N.W.2d at 543. But "[w]here the employer does not rely exclusively on subjective criteria, but also on objective criteria and education, the use of subjective considerations does not give rise to an inference of discrimination." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1049 (8th Cir. 2011). Here, MAC's promotion processes included both objective and subjective standards, such as the written exercise, first-line supervisor review, panel interview, and chiefs' interview. And "[e]mployers are entitled to compare applicants' performance during interviews." *Id.* Aside from arguing that promotion decisions rest entirely on the subjective beliefs of the chief of police, Wingate fails to identify any evidence that the interviews in which he participated were discriminatory. Accordingly, MAC's promotion process does not create an inference of pretext.

Continued Engagement in Protected Activity

Wingate next contends that his continued engagement in protected activity supports a reasonable inference of pretext. He maintains that he "was a squeaky wheel that continually needed oiling," and that a reasonable juror could infer that MAC's "need to repeatedly spend time and resources on Wingate's complaints and/or have him questioning what was happening at the organization" played a role in MAC's promotion decisions.

In support of his argument, Wingate relies on *Eliserio v. United Steelworkers of Am. Local 310*, 398 F.3d 1071 (8th Cir. 2005). In *Eliserio*, the Eighth Circuit determined that a reasonable jury could infer that the employer's attempt to remove an employee from a position was motivated by the employer's "desire to avoid the drain on his time caused by [the employee's] continuing complaints of racial harassment." *Id.* at 1079. But,

importantly, the employer in *Eliserio* admitted that he was forced to devote significant time investigating and remedying the employee's complaints. *Id.*

Given that Wingate has not provided evidence that anyone was concerned about the impact of his statements on the department, his argument is unpersuasive. On the contrary, after Wingate reported Desubijana's conduct in 2012, he recounted in his deposition that Deputy Chief Tolsma thanked him, stating, "[h]ey, I just want you to know, all that stuff you brought to me, we needed to know that." Wingate's continued engagement in protected activity does not create an inference of pretext.

2012 Ranking List

Wingate further asserts that MAC altered the 2012 rankings to lower his rank from third to sixth, and that this supports an inference of pretext. In one document containing the candidates' final rankings in the 2012 promotion process, Wingate ranked third. However, in another document with the candidates' names covered, the promotability index was removed by hand, causing Wingate's rank to decrease to sixth. Wingate contends that MAC provided no justification for the alteration of the 2012 rankings. But it does not appear from the record that Wingate ever inquired into the reason MAC removed the promotability index. Because "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), the 2012 ranking list does not support an inference of pretext.

2014 Promotion Process

Next, Wingate contends that MAC's decision to repost the sergeant position in 2014, rather than promote a candidate from the existing list, has no basis in fact and is

therefore pretextual. In his deposition, Chief Everson explained that, because the 2014 promotion process was his first as chief of police, he intended to ensure that the sergeant class properly represented the department by including more diverse members. Wingate, however, contends that this justification for reposting the sergeant list is untrue because Chief Everson could have hired a female candidate in 2013, when he was the hiring manager, and Chief Everson hired four white males after becoming chief of police. But Wingate's argument ignores that the first candidate promoted out of the 2014 process was a female officer, and his assertion is therefore unpersuasive.

Wingate's Performance History

Wingate also argues that his performance record directly contradicts MAC's reason for not promoting him to sergeant. "Evidence of a strong employment history will not alone create a genuine issue of material fact regarding pretext and discrimination, but it can be relevant when considering whether the record as a whole establishes a genuine issue of material fact." *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 975 (8th Cir. 2012) (quotations omitted). According to MAC, the reason that it did not promote Wingate was because he was "too rigid and black and white without a sufficient grasp of the big picture role of a manager within [the department] and the larger organization of the MAC." But, aside from Wingate's 2007 evaluation where his supervisor commented that he "has a tendency to appear black and white," these comments do not appear in any of Wingate's evaluations.

Wingate's positive performance history throughout his career at MAC casts genuine doubt upon MAC's stated reason for not promoting him to sergeant. In Wingate's

evaluations from 2014 to 2016, his supervisors classified his performance as "Achieved" or "Exceeds" in every job category, including job knowledge and comprehension, work quality, productivity and timeliness, problem solving and decision-making, interpersonal skills, communication, MAC policies, and department- and position-specific competencies. In Wingate's 2014 performance review, his supervisor noted that he "[t]eaches others well" and advised him to "[c]onsider brushing up on interview skills for future promotional opportunities." And while MAC points to Wingate's excessive-force case in 2008 as evidence of poor supervisory skills, Wingate also had positive supervisory experience as a field training officer after that case.[1] Indeed, Wingate delayed his transfer to the DEA position, upon the request of MAC, to train a new officer. Moreover, in 2017, Wingate received the "Chief's Award of Merit," which is "[a]warded to the department member for courageous, outstanding or unusual performance of duty that is significantly beyond that normally expected and may be based on a single act or on exemplary work over an extended period of time." That same year, Wingate ranked first out of all the candidates following the initial phase of the promotional process. Wingate's positive performance reviews directly challenge MAC's articulated reason for not promoting him to sergeant and suggest that the reason is pretextual.

[1] In 2008, MAC and Wingate were sued for alleged excessive use of force. *Orsak v. Metro. Airports Comm'n Airport Police Dep't*, 675 F. Supp. 2d 944 (D. Minn. 2009). The lawsuit arose out of an incident where Wingate ordered a trainee to use a taser on a bicyclist after the bicyclist failed to follow his commands. *Id.* at 948-51. The federal district court dismissed MAC from the lawsuit, but concluded that "[a] reasonable jury could conclude that Officer Wingate's order to deploy the taser was not reasonable in light of the severity of [the bicyclist's] crimes, the threat posed by [the bicyclist], and [the bicyclist's] lack of active resistance or flight." *Id.* at 955. The matter settled out of court.

Supervisor Comments

Wingate further asserts that comments made by his supervisors call into question MAC's stated reason for not promoting him. First, Wingate claims that Lieutenant Roediger's e-mail from 2013, which advised against promoting a candidate from the 2012 promotion list, demonstrates retaliatory motive. In that e-mail, along with criticizing the two other top-ranked candidates from the 2012 list, Lieutenant Roediger stated as to Wingate, "No Way . . if I have to explain why . . . . then go do your homework." (Ellipses in original.) Next, Wingate points to Lieutenant Roediger's supervisor-ranking sheet, submitted during the initial phase of the 2017 promotion process. On the form, Lieutenant Roediger listed an area of concern for Wingate, advising that he "needs to let events of the past go that are negative in nature. I.E.: removal from DEA, past issue w/ Sgt." Lastly, Wingate asserts that a deputy chief acknowledged the potential for negative employment consequences arising from Wingate's protected activity, and that this acknowledgment is evidence of a retaliatory atmosphere. MAC ascribes its own meanings to these remarks.

The district court dismissed this argument as speculative, stating that "[a]t this stage in the *McDonnell Douglas* analysis, the Court need not view the evidence in the light most favorable to Wingate, but instead, Wingate retains the burden of establishing that the defendant's conduct was based on unlawful discrimination." (Quotation omitted). But while evidence of pretext is considered in regard to the employer's proffered justification, *Sprenger*, 253 F.3d at 1111, the overarching summary-judgment standard requires that the facts be viewed in the light most favorable to the non-moving party, *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 272 (Minn. 2017).

Taking such a view, these comments cast doubt on MAC's articulated reason for not promoting Wingate. Lieutenant Roediger's comment in 2013 implicitly indicates that Wingate should not be promoted from the 2012 list because of his reports regarding Desubijana's conduct. And the 2017 remark, made during the promotion process, explicitly lists Wingate's engagement in protected conduct as an area of concern. The deputy chief's concern that Wingate would face adverse employment actions arising from his reports also tends to show that MAC's stated reason for not promoting Wingate was not the true reason. *See, e.g., Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001) ("Evidence of a discriminatory attitude in the workplace, though it may not rise to the level of direct evidence, may also tend to show that the employer's proffered explanation for the action was not the true reason for the discharge."). The remarks made by Wingate's supervisors, when viewed in the light most favorable to Wingate, create an inference of pretext.

Promotion Processes Between 2012 and 2017

In addition, Wingate also points to MAC's promotion processes between 2012 and 2017 as evidence of pretext. He asserts that MAC always promoted the first-ranked candidate after the first phase of the promotion process, and that MAC's pattern of bypassing him for promotion on nine occasions could allow a jury to conclude that he was subject to retaliation.

During the 2017 promotion process, when Wingate ranked first out of all the candidates, MAC promoted lower-ranked candidates to fill the two vacant sergeant positions and removed Wingate's name from future consideration. However, in the

previous promotion processes, MAC promoted the first-ranked candidate, either from a newly-created promotion list to fill a current vacancy or later from an existing list to fill a subsequent vacancy. Considered in the light most favorable to Wingate, the fact that he was not promoted when he was the first-ranked candidate in 2017, despite MAC's history of promoting the first-ranked candidate, supports an inference that Wingate's engagement in protected activity was the true reason that MAC did not promote him to sergeant.

Similar Complaint of Retaliation

Finally, Wingate contends that a sergeant's similar complaint of retaliation supports his own argument that MAC's proffered reason for not promoting him was pretextual. Wingate cites *Hite v. Vermeer Mfg. Co.* in support of his argument. 446 F.3d 858 (8th Cir. 2006). In that case, on appeal from a jury verdict, the court considered evidence that other employees, in addition to the appellant, experienced retaliation for taking leave under the Family and Medical Leave Act and concluded that this evidence demonstrated a pattern of discrimination. *Id.* at 868.

Here, the district court distinguished *Hite* stating that, unlike the employees in *Hite*, Wingate was not similarly-situated to the sergeant who also reported retaliation. However, this distinction is misplaced. The *Hite* court did not analyze the status of the employees, but merely included in its analysis that other employees also experienced retaliation by the employer. *Id.* The sergeant's complaints of retaliation therefore support Wingate's claim.

In sum, we conclude that Wingate's positive performance reviews, together with his supervisor's remarks, MAC's promotion patterns, and a sergeant's similar report of retaliatory conduct, support an inference that Wingate's engagement in protected activity

was the true reason that MAC did not promote him to sergeant. Because there is a triable issue on the pretext prong of the *McDonnell Douglas* test, summary judgment is inappropriate.

Reversed and remanded.