STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0379

Linda Gensmer, as Personal Representative of the
Estate of Thomas Sendecky,
Appellant,

vs.

Minnesota Department of Labor and Industry,
Respondent.

Filed December 23, 2019
Affirmed
Peterson, Judge[*]

Ramsey County District Court
File No. 62-CV-17-5817

John J. Steffenhagen, Jason S. Raether, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

Keith Ellison, Attorney General, Julianna F. Passe, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and Peterson, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

Appellant challenges the summary-judgment dismissal of his disability-discrimination claims under the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2018 & Supp. 2019), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213 (2012), arguing that the district court applied the incorrect legal standard when analyzing the claims under the MHRA and that the district court erred when it determined that there were no genuine issues of material fact regarding his ADA claims. We affirm.

FACTS

Thomas Sendecky[1] began working for the Minnesota Department of Commerce in February 2000 as an investigator of residential building contractors. He was later promoted to senior investigator, and, in 2005, he transferred to respondent Minnesota Department of Labor and Industry (DLI) and continued to work in the same capacity. He received positive performance reviews and was considered a valued employee of DLI.

In September 2014, Sendecky was hospitalized for alcohol dependency. He later requested intermittent leave under the Family and Medical Leave Act (FMLA) to allow him to pursue outpatient treatment. He worked with Sandi Arvin, a human-resources

[1] Sendecky was the original plaintiff in this action. After the district court entered judgment, but before the appeal was filed, Sendecky died. On July 24, 2019, this court issued an order substituting Linda Gensmer, personal representative for the estate of Thomas Sendecky, as the appellant. *See* Minn. R. Civ. App. P. 143.02. But, for clarity, we refer to the appellant as Sendecky.

representative for DLI, on the request. DLI requested that Sendecky provide medical certification from his health-care provider, and he provided DLI with medical records that confirmed his hospitalization and a certification from his doctor indicating that he needed to work a part-time or reduced work schedule to allow him to seek outpatient treatment. The certification stated that Sendecky would need to reduce his work schedule by "2.5 hours per day; 3 days per week from October 6, 2014 through February 17, 2015." The certification also stated that Sendecky would not be "incapacitated for a single continuous period of time due to [his] medical condition, including any time for treatment and recovery," and that the condition would not cause episodic flare-ups that would prevent him from performing his job functions.

On October 16, 2014, DLI approved intermittent leave for Sendecky. Consistent with the medical certification, DLI approved Sendecky to work a schedule reduced by three hours per day, three days per week, from October 6, 2014, through February 17, 2015. Shortly thereafter, Sendecky used several days of leave without prior approval. Specifically, on October 31, he called in to request a vacation day; on November 4, he called in sick; on November 5, he again called in to request a vacation day; and on November 6, he called in and stated that he had a therapy appointment and would be in by 10:30 a.m. He did not arrive until noon on November 6, however, and at 12:30 p.m. his supervisor, Steven Best, observed him sleeping at his desk.

On November 7, 2014, Best met with Sendecky to discuss his attendance and whether he was still seeking outpatient treatment. Best's summary of the meeting states that Sendecky reported that his treatment was progressing satisfactorily, denied allegations

from his coworkers that he was drinking during work hours, and attributed his requests for additional time off and sleeping at his desk on November 6 to caring for his elderly parents. The report further indicated that Best advised Sendecky that, if he had suffered a lapse in alcohol abstinence, he should seek inpatient treatment.

On November 13, 2014, Sendecky again met with Best. He told Best that outpatient treatment was not effective, that his alcohol dependency was getting worse, and that he wished to use FMLA leave to seek inpatient treatment. According to Sendecky, Best told him to "take 30 days and figure this out," and did not provide any instruction that he should bring his request for FMLA leave to the human-resources department. Best denies authorizing leave and asserts that he told Sendecky that if he wished to seek additional leave, he should request it, but that Sendecky never made such a request. Best expected Sendecky to report to work the following day, Friday, November 14.

Sendecky did not go to work on November 14 and did not call to report that he would be absent. Best spoke to him that day by phone to determine why Sendecky was not at work. Sendecky told Best that he was seeking inpatient treatment, and Best responded that Sendecky was required to call in every day that he was absent. On Monday, November 17, Sendecky called Best and told him that he had a medical appointment to get a referral for inpatient treatment. But Sendecky did not actually attend a medical appointment. The following day, Sendecky was again absent from work. Best called him that afternoon, and Sendecky told Best that he was still seeking inpatient treatment. Best reported to Arvin that Sendecky had been absent for the past three work days. Arvin contacted Sendecky, and he told her that he was on FMLA leave. Arvin told him that his

approved FMLA leave authorized only part-time leave and did not allow for an extended absence. Arvin told Sendecky that, in order for DLI to authorize an extended leave, he would need additional medical documentation that stated his medical condition and the length of absence he would need.

On November 18, Arvin sent Sendecky a letter, which stated:

> This letter is to notify you that you have been on an unauthorized leave of absence since November 14, 2014. To date, we have not received any medical documentation regarding your current absence.
>
> This documentation must include specific medical reason/s for which you are absent from work, the likely duration of your absence, and the reasons you are unable to perform your job functions. If you do not provide sufficient medical documentation by end of day Tuesday, November 25, 2014, we will consider this a voluntary resignation effective Wednesday, November 26, 2014.

Sendecky received the letter the following morning, November 19, 2014. He called Best to ask about the letter. According to Best, Sendecky stated that he believed he was already covered by FMLA, and Best reminded him that his FMLA leave authorized only a reduced work schedule for Sendecky to attend counseling sessions. On November 20, Arvin sent Sendecky an email that stated that his timesheet would be adjusted to reflect that he was on unauthorized leave beginning on November 14 and that DLI had yet to receive documentation indicating the reason for his leave. Sendecky missed work again on Friday, November 21, and Monday, November 24, but called in to report that he would not be at work.

On November 25, Sendecky went to work to speak with Arvin. Arvin again explained to Sendecky that he needed medical documentation to support continuous, full-day leave. Sendecky stated that he could not get the documentation because his doctor was on vacation. Arvin replied that if he could get a note from his doctor's staff confirming that the doctor was on vacation, then she could extend the period for him to get the medical documentation. Sendecky did not get the requested medical documentation or a note confirming that his doctor was out of town by the end of the day on November 25. Because Sendecky failed to provide the requested documentation, Arvin drafted and couriered to Sendecky a letter informing him that DLI was processing his voluntary resignation.

On September 22, 2017, Sendecky served DLI with a summons and complaint that alleged disability discrimination under the FMLA, the MHRA, and the ADA. DLI moved for summary judgment, and the district court granted DLI's motion. The district court determined that (1) Sendecky's claims under the FMLA were barred by the statute of limitations; (2) Sendecky failed to establish a prima facie case for disability discrimination under the MHRA; (3) while Sendecky established a prima facie case under the ADA, the claim was nonetheless meritless because DLI had a legitimate, nondiscriminatory reason for determining that Sendecky voluntarily resigned, and he could not show pretext; and (4) Sendecky's claims for failure to accommodate under the MHRA and ADA failed because DLI provided Sendecky with reasonable accommodation.

This appeal follows.[2]

[2] Sendecky does not challenge the district court's determination that his FMLA claims are barred by the statute of limitations, and those claims are not at issue on appeal.

D E C I S I O N

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). 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). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

I. Disability Discrimination

Sendecky argues that the district court erred by dismissing his claims for discharge based on disability discrimination under the MHRA and ADA. Disability-discrimination claims under the MHRA and the ADA that are not based on direct evidence are subject to the three-part *McDonnell Douglas* burden-shifting test. *See Hoover v. Norwest Private Mort. Banking*, 632 N.W.2d 534, 542 (Minn. 2001); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 808 (Minn. App. 1992), *review denied* (Oct. 20, 1992). Under the first step of this test, the employee bears the burden of establishing a prima facie case of discrimination. *Hoover*, 632 N.W.2d at 542. If the employee does so, the burden shifts to the employer to establish a legitimate, nondiscriminatory reason for the employee's termination. *Id.* If the employer establishes such a reason, the burden shifts back to the employee to show by a preponderance of the evidence that the legitimate reason offered by the employer was not the true reason for termination, but rather a pretext for discrimination.

Id. To avoid summary judgment on his disability-discrimination claims, Sendecky needed to point to evidence creating genuine issues of material fact as to the application of the *McDonnell Douglas* test. *Id.*

A. MHRA

The district court dismissed Sendecky's disability-discrimination claim under the MHRA because it determined that Sendecky failed to present evidence that DLI replaced him with a non-member of his protected class, which was necessary to establish a prima facie case of discrimination. Sendecky argues that the district court applied an incorrect legal standard and erred in dismissing this claim. We review the district court's application of the law de novo. *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

In *Hoover*, the supreme court stated that, to establish a prima facie case that an employee was discharged based on disability discrimination, the employee must show that he is a member of a protected class, he was qualified for the job from which he was discharged, and he was replaced by a non-member of the protected class. 632 N.W.2d at 542. These requirements have been reiterated in both state and federal cases that address disability-discrimination claims under the MHRA. *See Boldt v. N. States Power Co.*, 904 F.3d 586, 591 (8th Cir. 2018); *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 38 (Minn. App. 2009). Accordingly, the district court correctly identified the requirements to establish a prima facie case of discrimination under the MHRA.

Sendecky also argues that it was error for the district court to dismiss the claim on this basis because DLI never raised the issue of whether Sendecky was replaced by a non-

member of his protected class. But, in its memorandum of law in support of its motion for summary judgment, DLI articulated that one of the elements required to establish a prima facie case of discrimination under the MHRA was that Sendecky must show that he was replaced by a non-member of his protected class. There is no evidence in the record to support that Sendecky was replaced by a non-member of his protected class. Thus, Sendecky failed to establish the elements of a prima facie case of discrimination under the MHRA. The district court did not err by dismissing Sendecky's claim for disability discrimination under the MHRA.

B. ADA

Prima facie case and legitimate, nondiscriminatory reason

The district court determined that Sendecky established a prima facie case of discrimination under the ADA and, therefore, the burden shifted to DLI to provide a legitimate, nondiscriminatory reason for Sendecky's termination. To meet this burden, DLI needed to provide a reason that, "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *Aase v. Wapiti Meadows Cmty. Techs. & Servs., Inc.*, 832 N.W.2d 852, 857 (Minn. App. 2013), *review denied* (Minn. Aug. 6, 2013). The district court determined that the reason DLI provided—"Sendecky's absence from work for eight consecutive business days combined with his failure to provide medical documentation showing that he was entitled to leave"—was a legitimate, nondiscriminatory reason for termination. To support its determination, the district court cited *Lindgren*, which states that "[a]ttendance problems may be a legitimate basis for an employer's decision to terminate an employee." 489 N.W.2d at 808.

Sendecky argues that the district court erred in determining that DLI provided a legitimate, nondiscriminatory basis for termination because his leave was authorized. But the documents in the record show that Sendecky was authorized for only a reduced work schedule, not continuous, full-time leave. The medical documentation that Sendecky provided confirmed his alcohol-dependency diagnosis and his prior hospitalization, but only the FMLA medical certification addressed the leave required to seek further treatment. That certification states that Sendecky (1) would be able to perform his job functions; (2) would not be incapacitated for any continuous period of time; (3) would not suffer from periodic flare-ups that would render him unable to perform his job functions; and (4) would not need to be absent during any flare-ups. Consistent with the documentation that Sendecky provided, the leave that Sendecky was granted authorized only three-hours off, three days per week, to attend outpatient counseling sessions. Although, by itself, Best's November 13 statement to Sendecky that he should "take 30 days and figure this out" could initially have been understood as granting Sendecky a leave of absence, Best's later action in calling Sendecky on November 14 and asking why he was not at work and Arvin's November 18 letter stating that Sendecky was on unauthorized leave plainly indicated to Sendecky that he had not been granted continuous, full-time leave.

Sendecky also argues that DLI failed to communicate what additional documentation he was required to submit to justify his leave. This argument is primarily based on Arvin's statement during her deposition that she could not recall what additional documentation was needed. But, during the deposition, which occurred more than three years after the events at issue, Arvin was not shown any of the medical documentation or

communications between Sendecky and DLI. After reviewing the relevant documents, Arvin submitted an affidavit stating that Sendecky had been required to submit documentation that (1) showed that he needed full-time, rather than intermittent, leave; (2) identified the condition necessitating the leave; and (3) stated the duration of the leave. This is consistent with the November 18 letter that Sendecky received, which explained to him that his required documentation needed to "include specific medical reason/s for which you are absent from work, the likely duration of your absence; and the reasons you are unable to perform your job functions."

Pretext for discrimination

Sendecky argues that DLI's "shifting rationale" to support his termination supports his assertion that the reason DLI offered was a pretext for discrimination. An employer's inconsistent statements regarding the basis for termination can be evidence of pretext. *Young v. Warner-Jenkinson Co. Inc.*, 152 F.3d 1018, 1023 (8th Cir. 1998). Sendecky argues that DLI provided eight different reasons to justify his discharge: (1) he failed to provide the requested medical documentation; (2) he was on unauthorized leave; (3) he left work on November 25, 2014, and did not return; (4) he was discharged for unrelated disciplinary actions; (5) he failed to complete his assignments on time; (6) he was not being treated for substance abuse during his leave; (7) he did not send an email request to document his time off; and (8) he failed to call in daily during his leave.

The district court reviewed the record and determined that DLI consistently argued that it terminated Sendecky because he took an unauthorized leave and failed to submit the necessary documentation to justify the leave. Sendecky argues that the district court erred

in determining that the statements were consistent. But a review of the record supports the district court's determination.

The first three reasons alleged by Sendecky relate to his failure to provide the necessary medical documentation by the required date. Reasons four, five, and eight are taken from a report that DLI submitted to the Equal Opportunity Employment Commission, which provided an extensive history of Sendecky's employment with DLI, including his disciplinary history and policy violations. The report does not suggest that these were reasons for Sendecky's termination, rather, it states that he was discharged because he was on unauthorized leave and did not provide medical documentation. Finally, reasons six and seven similarly stem from an overview of the events that occurred during Sendecky's leave; they were not offered as justifications for his discharge, they were merely statements made about what occurred during the relevant period. We agree with the district court that DLI consistently offered one rationale for Sendecky's discharge—that he was on unauthorized leave and did not submit the documentation needed to support that leave. The district court did not err in determining that Sendecky failed to present evidence sufficient to permit a rational trier of fact to find that the reason offered by DLI was a pretext for discrimination.

II. Failure to Accommodate

The district court rejected Sendecky's claims that DLI failed to accommodate his disability. Under the MHRA and the ADA, an employer must reasonably accommodate an employee's disability. Minn. Stat. § 363A.08, subd. 6; 42 U.S.C. § 12112(b)(5)(a). To establish a failure-to-accommodate claim under either the MHRA or the ADA, Sendecky

needed to show that he is a qualified individual with a disability and that DLI knew of the disability but failed to provide a reasonable accommodation. *Hoover*, 632 N.W.2d at 547. A reasonable accommodation is one that will enable the employee "to perform the essential functions" of the job. 29 C.F.R. § 1630.2(o)(ii).

Sendecky argues that, because he provided adequate medical records to support his request for a leave and the leave was not provided, DLI failed to accommodate his disability. But the only medical certification that Sendecky provided indicated that he would not require a continuous period of leave to seek treatment. The medical certification was specific about the time-off required, and DLI authorized FMLA leave consistent with the medical certification. Because the certification stated that Sendecky would not need full-time, continuous leave, DLI reasonably accommodated his disability when it provided intermittent leave to allow for outpatient treatment.

Sendecky also argues that DLI failed to provide him an accommodation to seek treatment when it gave him only four business days to provide the additional medical documentation. But a reasonable accommodation is one that will enable the employee to perform essential functions of the job, and additional time to obtain the medical documentation needed to receive additional leave was not required to enable Sendecky to perform his job. Thus, providing additional time could not be a reasonable accommodation.

The ADA also requires that the employer engage in an interactive process with the employee to determine the appropriate accommodation. *Burchett v. Target Corp.*, 340

F.3d 510, 517 (8th Cir. 2003).[3] To satisfy the interactive-process requirement, an employer must engage in a discussion with the employee about the availability of a reasonable accommodation and make a good-faith effort to assist the employee in finding a reasonable accommodation. *McBee*, 925 N.W.2d at 228.

Employers may demonstrate that they engaged in the interactive process by showing that they met with the employee, asked the employee what accommodations he wanted, considered the request, and discussed alternatives. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 953 n.7 (8th Cir. 1999).

> A disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Id. at 952 (citation omitted).

Sendecky initially was granted intermittent leave to seek outpatient treatment, but he later told Best that he wished to seek inpatient treatment. At that point, the only accommodation to consider was time off to seek treatment. DLI did not fail to consider Sendecky's request for additional leave; it specified the documentation that it needed to expand his leave from intermittent to full-time and told Sendecky that he needed to provide the documentation by November 25.

[3] The Minnesota Supreme Court recently determined that the MHRA does not have such a requirement. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 223 (Minn. 2019).

When Sendecky received Arvin's letter November 18, he had known since at least November 13 that he needed to seek inpatient treatment and had told Best that he had a medical appointment on November 17 to get a referral for inpatient treatment. Also, when Sendecky told Arvin on November 25 that his doctor was out of town, Arvin told him that, if he got a note from his doctor's staff confirming that the doctor was on vacation, she could extend the period for him to get the medical documentation.

On this record, a rational trier of fact could not find that DLI did not make a good-faith effort to assist Sendecky in seeking an accommodation when it notified Sendecky on November 18 that, by November 25, he needed to provide specific medical documentation that supported the expansion of his leave. The district court did not err in determining that DLI properly engaged in the interactive process with Sendecky as required by the ADA or in dismissing Sendecky's failure-to-accommodate claims.

Affirmed.