STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0604

Wayne P. Steffens,
Appellant,

vs.

State of Minnesota, Department of Natural Resources,
Respondent.

Filed November 12, 2019
Affirmed
Connolly, Judge

Lake County District Court
File No. 38-CV-18-347

Christopher J. Moreland, Charles D. Moore, Halunen Law, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Hillary A. Taylor, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Klaphake, 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

CONNOLLY, Judge

Appellant challenges the district court's order dismissing his whistleblower claim, arguing that the district court erred in (1) finding that he did not engage in protected conduct; (2) dismissing his complaint with prejudice; and (3) not granting him leave to amend his complaint. Because the district court did not err in determining that appellant did not report conduct that implicated a violation of law, and because the district court did not abuse its discretion in dismissing his complaint with prejudice and without first granting him leave to amend, we affirm.

FACTS[1]

From May 6, 2013, until October 14, 2014, respondent Minnesota Department of Natural Resources employed appellant Wayne P. Steffens as a part-time seasonal, temporary Natural Resources Specialist. After appellant started this position, respondent's human resources (HR) department informed him that state rules only allowed him to work 12 months within a 24-month period. In September 2013, appellant's supervisors notified him that, sometime in 2014, they planned to fill a new unlimited, part-time seasonal position that matched his skillset.

When appellant returned to work in April 2014 for a second season in his temporary appointment, he was again reminded that he could only work 12 months within a 24-month

[1] Because this case arises from a dismissal for failure to state a claim under Minn. R. Civ. P. 12.02(e), we take all of appellant's allegations as true. *See Engstrom v. Whitebirch, Inc.*, 931 N.W.2d 786, 790 (Minn. 2019).

period as a temporary employee. Appellant's interview for the new unlimited position was scheduled for October 30, 2014. On October 14, 2014, appellant reached the maximum duration of work allowed under his temporary appointment. Respondent elected to rehire appellant on October 20 through an emergency appointment, extending his employment through November 30. Respondent offered appellant the unlimited position in late November 2014. Before appellant accepted the position, respondent's HR department notified him that his emergency appointment had been extended. While appellant worked in the emergency appointment position, he earned no benefits.

Believing that these emergency appointments were unlawful, appellant contacted respondent's HR department three times in late 2014.[2] Each time appellant spoke with someone from HR, he was cut off or treated rudely when he sought to explain his position that his emergency appointment violated a state law or rule. Shortly after appellant started his new unlimited position in April 2015 on a probationary status, his supervisor, A.H., began treating him poorly. A.H. subjected appellant to false accusations of misbehavior, conjured up nonexistent employment policies, prohibited him from contacting HR, and limited his ability to perform his job functions. In September 2015, appellant emailed a formal complaint to respondent's HR director, citing A.H.'s violation of state workplace policy. The next day, appellant received a discharge letter at his home and by email.

In August 2018, appellant, proceeding pro se, sued respondent for unlawful retaliation under the Minnesota Whistleblower Act (MWA). The district court granted

[2] The record does not reveal the exact dates that appellant made these three reports.

respondent's motion to dismiss for failure to state a claim, finding in its order that appellant did not engage in statutorily protected conduct. This appeal followed.

D E C I S I O N

I. Dismissal for Failure to State a Claim

Appellant first argues that the district court erred in dismissing his complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim. "We review de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). "We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Id.*

Appellant's sole claim alleged unlawful retaliation under the MWA, which prohibits employers from discharging an employee, who "in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer . . . ." Minn. Stat. § 181.932, subd. 1(1) (2018).[3] A whistleblower claim has three elements: (1) the employee engaged in statutorily protected conduct; (2) the employee suffered an adverse employment action; and (3) the preceding elements share a causal connection. *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011). Because the

[3] In 2013, the Minnesota Legislature amended the MWA to define the phrase "good faith" as "conduct that does not violate section 181.932, subdivision 3." 2013 Minn. Laws ch. 83, § 1, at 468. The Minnesota Supreme Court has interpreted this amendment as eliminating the prior judicially crafted definition of "good faith" that a whistleblower seek to expose an illegality when reporting unlawful conduct. *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W.2d 162, 165 (Minn. 2017). Now to report in good faith, an employee's report cannot be knowingly false or made in reckless disregard of the truth of the matter asserted within the report. Minn. Stat. § 181.932, subd. 3 (2018).

district court based its dismissal on a finding that appellant did not engage in statutorily protected conduct, only the first element of his whistleblower claim is at issue.

To establish a viable whistleblower claim, the employee need not identify in his or her report the specific law being violated, but the reported conduct must implicate some federal or state law or rule. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 19 (Minn. 2009). A report that alleges troubling, but nonetheless lawful behavior, does not constitute protected conduct under the MWA. *Id.* at 22; *see also Hedglin v. City of Willmar*, 582 N.W.2d 897, 902 (Minn. 1998); *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 504 (Minn. 1991). "The proper standard to apply when assessing the legal sufficiency of a claim under the whistleblower statute is to assume that the facts have occurred as reported and then determine . . . whether those facts 'constitute a violation of law or rule adopted pursuant to law.'" *Kratzer*, 771 N.W.2d at 22 (quoting *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002)).

In district court, appellant claimed that his reports to respondent's HR department implicated a violation of Minn. Stat. § 43A.15 (2018) and Minn. R. 3900.8200 (2017). Both provisions delineate the circumstances in which appointing authorities, such as a state agency, may make an emergency appointment. The statute provides: "An appointing authority may make an emergency appointment for up to 45 working days. No person may be employed in any one agency on an emergency basis for more than 45 working days in any 12-month period." Minn. Stat. § 43A.15, subd. 2. The accompanying administrative rule states: "An appointing authority may make an emergency appointment to meet unique and immediate needs. The appointing authority may appoint any person considered

qualified. Appointments are limited to 45 working days in any 12-month period by Minnesota Statutes, section 43A.15, subdivision 2." Minn. R. 3900.8200. As a state agency, respondent is an "appointing authority." Minn. Stat. § 43A.02, subds. 2, 5 (2018).

Appellant argues that Minn. R. 3900.8200 is ambiguous. We disagree. To assess the legal sufficiency of appellant's whistleblower claim, we must interpret the rule. Statutory interpretation principles govern the interpretation of administrative rules. *J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 5 (Minn. 2016). We review statutory interpretation issues de novo. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 227 (Minn. 2019). If a rule is unambiguous—meaning it is not susceptible to more than one reasonable interpretation—"we construe the rule according to the common and approved usage of its words and phrases and do not disregard the rule's plain meaning to pursue its spirit." *Troyer v. Vertlu Mgmt. Co./Kok & Lundberg Funeral Homes*, 806 N.W.2d 17, 24 (Minn. 2011).

The rule's plain language reveals that it is not susceptible to more than one reasonable interpretation. Appellant asserts that Minn. R. 3900.8200 does not allow appointing authorities to casually use emergency appointments to extend the limits of a temporary appointment. For support, appellant points to the fact that an appointing authority must receive commissioner approval before hiring an individual through a temporary appointment under Minn. Stat. § 43A.15, subd. 3. However, the plain language regarding emergency appointments in Minn. Stat. § 43A.15, subd. 2 and Minn. R. 3900.8200 does not mention commissioner approval. Rather, both sources specifically allow appointing authorities to make an emergency appointment, subject to a 45-day

working limit within a 12-month timeframe. If the legislature had wanted to require commissioner approval for an appointing authority's use of an emergency appointment, it could have imposed the same requirements it did for temporary appointments. *Cf.* Minn. Stat. § 43A.15, subd. 3 ("The commissioner may authorize an appointing authority to make a temporary appointment of up to six months."); Minn. R. 3900.8300 (2017) ("The commissioner may approve an appointing authority's written request for a temporary appointment . . . .").

Appellant also claims that respondent's interpretation of Minn. R. 3900.8200 grants it unfettered discretion. Again, we disagree. The rule provides that appointing authorities "may" make emergency appointments to meet "unique and immediate needs." Minn. R. 3900.8200. The rule's plain language illustrates that appointing authorities are allowed to hire individuals to fill their unique and immediate needs, which will differ among the various state agencies. The statute and rule's 45-day working limit quells any concerns that an agency could abuse the emergency appointment provisions. *See* Minn. Stat. § 43A.15, subd. 2; Minn. R. 3900.8200. Appellant's arguments fail to show that Minn. R. 3900.8200 is ambiguous.

Applying the plain meaning of Minn. Stat. § 43A.15, subd. 2, and Minn. R. 3900.8200 to the allegations in appellant's reports to respondent's HR department, we conclude that he did not engage in protected conduct. Appellant's complaint alleged that he made three reports to respondent's HR department. In the first two reports, appellant informed respondent's HR department that his emergency appointment was illegal because it was done to circumvent the 12-month limitation of his temporary appointment. Even if

the facts alleged in the complaint are accepted as true, respondent did not violate the emergency appointment statute or rule. Neither the statute nor the rule forbids an agency from using an emergency appointment to rehire someone who has just reached the 12-month working cap under a temporary appointment. Thus, appellant's first two reports did not allege facts that, if true, implicated a violation of any law or rule adopted pursuant to law. *See Kratzer*, 771 N.W.2d at 22.

Similarly, appellant's final report, which alleged that respondent unlawfully extended his emergency appointment so he would not have to complete new "hire paperwork," does not implicate a violation of either Minn. Stat. § 43A.15 or Minn. R. 3900.8200. While using emergency appointments on employees to avoid having them complete paperwork may appear problematic, it is not illegal. *See Hedglin*, 582 N.W.2d at 902 (finding reported conduct that fire officers were showing up drunk to fire calls to be "reprehensible," but not a violation of any statute or rule); *Nordling*, 478 N.W.2d at 504 (describing reported conduct of surveilling employees for investigative purposes as "distasteful" and "ill-advised," but ultimately lawful).

Based on this analysis, appellant did not engage in protected conduct under the MWA because his three reports to respondent's HR department did not allege facts that, if true, violated a statute or rule. His good-faith belief that the conduct he reported to respondent's HR department was unlawful does not equal protected conduct within the MWA. *See Kratzer*, 771 N.W.2d at 22-23 (holding that employee did not engage in protected conduct when his report did not implicate a violation of any law, despite his

good-faith belief that the reported conduct was illegal). We therefore affirm the district court's dismissal of appellant's MWA claim.

II. Dismissal of Appellant's Complaint with Prejudice

Appellant next argues that the district court abused its discretion in dismissing his complaint with prejudice. A district court's decision to dismiss a claim with or without prejudice is reviewed for an abuse of discretion. *Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999). Dismissal with prejudice is appropriate when a district court dismisses a claim under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 735 (Minn. 2000).

Appellant relies on his statements at the motion hearing to the district court that he possessed "documents [and] emails from HR" and that he "could have included more information in [his] complaint if [he] thought it needed that." As noted above, appellant's reports did not allege unlawful conduct. His statements to the district court about possessing unidentified documents and emails from respondent's HR department did not put the district court on notice that he could introduce facts consistent with his pleaded theory to avoid dismissal. Accordingly, the district court did not abuse its discretion in dismissing appellant's complaint with prejudice after finding that he failed to state a claim upon which relief could be granted. *See id.*

III. Dismissal of Appellant's Complaint without Granting Leave to Amend

Lastly, appellant argues that the district court abused its discretion when it dismissed his complaint without providing him leave to amend. After a responsive pleading has been

served, a party seeking to amend a pleading must obtain leave of court or the adverse party's written consent, "and leave shall be freely granted when justice so requires." Minn. R. Civ. P. 15.01. A district court retains broad discretion in determining whether to allow a party to amend the complaint, and we review its decision for an abuse of discretion. *Forslund v. State*, 924 N.W.2d 25, 37 (Minn. App. 2019).

The Minnesota Rules of General Practice require a party bringing a nondispositive motion, such as a motion for leave to amend, to serve specified documents on the opposing party and file these documents with the court administrator. Minn. R. Gen. Prac. 115.04(a)(1)-(4). In *Forslund*, the appellants requested leave to amend in their responsive memorandum of law if the district court found their existing complaint to be insufficient. 924 N.W.2d at 37. This court held that the district court did not abuse its discretion in not addressing the appellants' request to amend because they never brought a proper motion. *Id.*

Here, as in *Forslund*, appellant never formally moved the district court to amend his complaint. At the hearing on respondent's motion to dismiss, the district court and appellant had the following exchange:

> APPELLANT: So I would ask that the motion be denied, or at the very worst, I'd be allowed to amend my complaint – if that is deemed necessary to state the claim.
> THE COURT: If you were granted leave to amend the complaint, what would – what would you be amending? What would you be including?
> APPELLANT: I guess I would have to think about what exactly I would be including to better allege what I feel like I've already alleged. Um sufficiently. Um, I'm not sure that there – I don't believe at this time there is a need to allege – to amend the complaint.

Beyond this exchange, no other mention of seeking leave to amend appears in the record.

Appellant did not serve respondent with a motion for leave to amend or file such motion with the court administrator. The parties never argued, and the district court did not consider, whether appellant should be granted leave to amend. Appellant's pro se status did not relieve him of bringing a proper motion for leave to amend his complaint. *See Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) (explaining that, while pro se litigants are afforded some accommodations, they are generally held to the same standards as attorneys). Thus, the district court did not abuse its discretion in not granting appellant leave to amend because he never formally moved to do so. *See Forslund*, 924 N.W.2d at 37.

Affirmed.