STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0343

Debra Sakrison,
Appellant,

vs.

City of Gilbert,
Respondent.

Filed December 14, 2020
Affirmed
Gaïtas, Judge

St. Louis County District Court
File No. 69VI-CV-19-30

Shawn B. Reed, Bray & Reed, Ltd., Duluth, Minnesota (for appellant)

Jessica E. Schwie, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Frisch, Judge; and Gaïtas, Judge.

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

GAÏTAS, Judge

Appellant Debra Sakrison challenges the district court's dismissal of her claims against her former employer, respondent City of Gilbert (the city), stemming from the termination of her employment as city clerk-treasurer. On the city's motion for summary judgment, the district court rejected Sakrison's three claims for (1) retaliatory discharge

under the Minnesota Whistleblower Act (MWA), (2) age and gender discrimination under the Minnesota Human Rights Act (MHRA), and (3) defamation per se. Because the record confirms that there are no genuine issues of material fact and Sakrison's claims fail as a matter of law, we affirm.

FACTS[1]

The city hired Sakrison as city clerk-treasurer in June 2013.[2] According to the city's charter and Sakrison's complaint, her duties as city clerk-treasurer included: facilitating and keeping records of city council meetings, maintaining the city's bank accounts, preparing financial information and offering recommendations to the city council and mayor, overseeing data privacy practices, performing administrative tasks, and administering oaths of office to elected city officials. Early in her tenure, Sakrison had a cordial working relationship and worked closely with the mayor and city council. But in July 2015, she began to experience conflict with certain city councilmembers, and she eventually complained to the mayor about one councilmember.

The city held an election in 2016, leading to the election of a new mayor and several new city councilmembers with terms beginning January 2017. Over the next two years, a number of conflicts arose between Sakrison and the newly elected officials, three of which are relevant to this summary-judgment appeal.

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[1] We present the facts here in the light most favorable to Sakrison, the nonmovant.

[2] The district court's order states the city hired Sakrison in 2003. But Sakrison's complaint, oppositional memorandum to summary judgment, and brief to this court indicate she was hired in 2013. We presume Sakrison offered the correct date and began her employment with the city in 2013.

First, before taking the oath of office, the mayor-elect and various incoming councilmembers scheduled a meeting with an engineering company and officials from a neighboring town to discuss a wastewater treatment project. According to Sakrison, she emailed the engineering company weeks before the December 2016 meeting date to cancel, stating, "[i]t will not be appropriate for individuals not currently sitting on the City Council to be involved in this type of a meeting. After the new members take their oaths of office it will be appropriate to conduct an informational session to bring them up to speed." [3] When the meeting date arrived, representatives of the engineering company did not appear. But the other attendees, who were unaware of Sakrison's email to the engineering company, waited in the meeting location for about 15 minutes. Then, Sakrison entered the room and informed everyone she had cancelled the meeting. Sakrison told the mayor-elect that she was not yet mayor and the new councilmembers had not yet taken office, so they were unable to hold a meeting about the wastewater project.

Second, a few weeks after the cancelled meeting, the city's IT administrator contacted Sakrison about a request from the mayor-elect and a city councilmember. He told Sakrison that they had asked him to turn over IT information, including login credentials for all city computers and those used by certain police departments. Sakrison

[3] In opposing summary judgment, Sakrison submitted a copy of her own written notes about the content of the email; she also quoted from the same email in pleading the factual description of her complaint. We note the record does not contain a copy of Sakrison's email or any other evidence corroborating the contents of the email she sent to the company before the meeting date. But, for purposes of summary judgment, we view the facts in the light most favorable to Sakrison. We therefore assume her description is accurate, and the city does not contend otherwise.

and the IT administrator discussed the situation and potential data practices implications, and the IT administrator ultimately did not furnish the requested information. Over the next few months, the IT administrator was put on leave and eventually discharged for reasons unrelated to the request for information; his termination led to a separate lawsuit against the city. Despite the city's instruction that all work-related communications with the IT administrator go through the city's attorney, Sakrison sent the IT administrator emails containing general city council information and copies of meeting minutes. She also contacted the city's technology service provider and requested all emails sent to the IT administrator's work email be forwarded to his personal email address.

Third, around December 2017, the city council contemplated changing the city's employee health plans to reduce costs. One councilmember explored options for a new plan and obtained quotes from different providers. That councilmember asked Sakrison to follow up with a provider for information about pricing. Sakrison refused. She told the councilmember that all changes to health plans must first be approved by the union.

In April 2018, the city hired a third-party investigator to review eleven allegations of employment misconduct against Sakrison. The investigator's findings were summarized in a final report that substantiated five of the allegations: (1) providing email access to the IT administrator, an ex-employee who was then suing the city; (2) failing or refusing to provide the city council with requested information; (3) preventing councilmembers from holding a meeting on a wastewater project; (4) promising a secretarial position to a job applicant, and making an inappropriate comment on gender regarding hiring decisions; (5) "show[ing] a lack of professionalism" and acting "openly

hostile and sarcastic." After receiving the investigative report, the city council terminated Sakrison's employment during a special meeting in July 2018.

Sakrison sued the city for wrongful termination in violation of the MWA, employment discrimination under the MHRA, and defamation per se. The city moved for summary judgment. The district court granted the city's motion, summarily dismissed Sakrison's complaint, and directed entry of judgment for the city.

This appeal follows.

D E C I S I O N

The district court "shall grant summary judgment if the movant shows that 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. Appellate courts review a district court's summary-judgment dismissal de novo. *See Warren v. Dinter*, 926 N.W.2d 370, 374-75 (Minn. 2019). In performing that review, appellate courts study the facts through a lens most favorable to the nonmovant by resolving all doubts and factual inferences in the nonmovant's favor. *Id.* To survive summary judgment, the nonmovant must "extract *specific*, admissible facts from the record that demonstrate that a genuine issue of material fact exists." *Beecroft v. Deutsche Bank Nat'l Tr. Co.*, 798 N.W.2d 78, 82 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. July 19, 2011). "A genuine issue of fact exists when reasonable minds can draw different conclusions from the evidence presented." *328 Barry Ave., LLC v. Nolan Props. Grp., LLC*, 871 N.W.2d 745, 751 (Minn. 2015).

With these principles in mind, our task is to consider whether the record evidence creates a genuine issue of material fact on each element of Sakrison's three claims and

whether the district court appropriately applied the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). Summary judgment will be affirmed "if it can be sustained on any grounds," *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012), which means "[t]his court can, if it needs to, affirm summary judgment on alternative theories presented but not ruled on at the district court level," *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006), *review denied* (Minn. Sept. 19, 2006).

I. The district court properly determined that the city is entitled to summary judgment on Sakrison's whistleblower claim.

Sakrison's first claim against the city is that she was terminated for "blowing the whistle" by either reporting an illegality or refusing the city's order to perform an unlawful act. To withstand summary judgment, Sakrison must demonstrate a genuine issue of material fact on each element of her whistleblower claim. We determine that she has not done so.

The MWA shields employees from employer retribution when the employee's conduct qualifies as whistleblowing activity under the statute. Minn. Stat. § 189.932, subd. 1(1)-(6) (2018). An employee is protected where the employee "in good faith, reports a violation, suspected violation, or planned violation of any federal or state law . . . to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1). A "report" occurs when the employee communicates verbally, in writing, or electronically about an actual, suspected, or planned violation of the law. Minn. Stat. §§ 181.931, subd. 6, .932, subd. 1(1) (2018). The MWA also safeguards an employee

who "refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law . . . and the employee informs the employer that the order is being refused for that reason." *Id.*, subd. 1(3). A refusal occurs when an employer gives an order to perform an action that the employee has an objective basis in fact to believe is illegal, and the employee then declines to perform that action. Minn. Stat. § 181.932, subd. 1(3).[4]

Minnesota courts analyze whistleblower claims under the three-pronged *McDonnell Douglas* burden-shifting test *See Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)), *review denied* (Minn. July 17, 2007). Under the first prong, a plaintiff must establish a prima facie whistleblower claim, which consists of three elements: (1) the employee engaged in "statutorily protected conduct," (2) the employer took "adverse employment action" against the employee, and (3) "a causal connection between the two." *Coursolle v. EMC Ins. Grp, Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011). On the second prong, the burden shifts to the employer to provide a "legitimate, non-retaliatory reason" for its action against the employee. *Id.* Finally, on the third prong, the employee must show that the employer's rationale is pretextual. *Id.*

Turning to the first prong of *McDonnell Douglas*, we consider whether Sakrison established a prima facie whistleblower claim.

[4] The parties and district court have used the terms "report" and "refusal" interchangeably throughout their analyses. While either may qualify as protected conduct, each is factually distinct from the other.

Sakrison's complaint identifies two situations in which she allegedly engaged in protected conduct. First, Sakrison effectively cancelled the December 2016 meeting on the wastewater project by informing the engineering company that a meeting with newly-elected officials, who had not yet taken office, was inappropriate. Second, the mayor-elect and a councilmember "improperly directed [the IT administrator] to compile and disclose sensitive IT data in violation of state data practices laws and public policy[,]" and "[the IT administrator] and [Sakrison] did not relent" to the "improper demand." The district court addressed the second situation in the order denying summary judgment. Because Sakrison does not challenge the district court's ruling on the second situation, we do not address it here.[5] Sakrison also raised a third instance of allegedly protected conduct in her motion papers opposing summary judgment that she did not specifically identify in her complaint. The third situation involved her "refus[al] to violate state law relating to health insurance" by declining to assist a city councilmember in researching new employee healthcare plans.[6]

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[5] "[E]rror is not presumed on appeal, and the burden of showing error rests on the party asserting it." *Horodenski v. Lyndale Green Townhome Ass'n, Inc.*, 804 N.W.2d 366, 372 (Minn. App. 2011) (citing *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975)). But even if error were presumed, the district court correctly determined that the record shows that Sakrison took no action in response to the IT administrator reporting the "improper demand" to her, and, therefore, she did not "blow the whistle" in any fashion. *Cokley v. City of Otsego*, 623 N.W.2d 625, 631 (Minn. App. 2001) (explaining that a "report" under the MWA requires that the employee "blow the whistle" by "notifying the employer of a violation of law that is clearly mandated public policy"), *review denied* (Minn. May 15, 2001).

[6] The city argued in the district court that the third allegation should not be considered because it was not included in Sakrison's complaint and was improperly raised as a response during summary-judgment proceedings. The district court acknowledged this problem but addressed the allegation anyway. Because the district court analyzed the issue on the merits, Sakrison challenges that decision on appeal, and the parties have adequately

Given the arguments before us, we must determine whether the first and third situations involved protected conduct under the plain meaning of the MWA. *See Schulte v. Corner Club Bar*, 544 N.W.2d 486, 488 (Minn. 1996) (noting that "summary judgment is a fully appropriate procedural vehicle to use when applying statutory language to the undisputed material facts of a case" (quotation omitted)).

A. Cancellation of the wastewater project meeting

In considering the first situation, the district court determined that Sakrison failed to establish a "causal connection," the third element of her MWA claim. The district court reasoned that the connection between Sakrison cancelling the wastewater project meeting in November 2016 and the city's decision to terminate her employment in July 2018 was "too attenuated." But to even reach the third element of causation, we must accept that Sakrison's conduct was protected by the MWA. We conclude that Sakrison's conduct was not protected; therefore, a discussion on causation is unnecessary.

Sakrison argues that she engaged in statutorily protected conduct "[b]y advising [the engineering company] of the status of the newly elected officials, their lack of oath, and lack of authority" to hold the informational meeting set in December 2016. She insists that through this communication, she "refused to engage in activity" that would have violated state law, which provides that public officials shall take an oath "before transacting any of the business or exercising any privilege of such office." *See* Minn. Stat. § 358.05 (2018). During oral argument, Sakrison's counsel clarified that Sakrison effectively cancelled the

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briefed the issue, we choose to address the claim raised for the first time on summary judgment.

wastewater project meeting by emailing the engineering company and that her actions are "tantamount to a refusal" under Minn. Stat. § 181.932, subd. 1(3). We disagree.

Sakrison's conduct was not protected as a matter of law because there is no evidence that Sakrison refused any order from the city. Subdivision 1(3) provides that conduct is protected only when "the employee *refuses an employer's order* to perform an action that the employee has an objective basis in fact to believe" is illegal. Minn. Stat. § 181.932, subd. 1(3) (emphasis added). There was no order. Sakrison has offered no evidence of the city ordering her to do anything in relation to the wastewater project meeting. The evidence shows that Sakrison took action entirely on her own initiative by emailing the engineering company. Indeed, the mayor-elect and incoming councilmembers were unaware of Sakrison's email to the engineering company until Sakrison announced—15 minutes after the meeting was supposed to begin—that she had cancelled it. There was also no evidence of a refusal. Cancelling a meeting on her own volition is not a refusal or even tantamount to a refusal. And we are unpersuaded by the general notion that Sakrison was implicitly required to facilitate the meeting at the direction of the city. Speculation and general assertions are insufficient to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). Thus, Sakrison has not shown that she refused an order from the city in relation to the wastewater project meeting.

Nor do we accept Sakrison's proposition that a meeting between the mayor-elect, incoming councilmembers, representatives of another community, and an engineering company was unlawful. Sakrison urges that an informational meeting held by newly elected, unsworn officials violates Minnesota Statutes section 358.05. We disagree. In

evaluating whether conduct is protected under the MWA, appellate courts "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 v. Welsh Cos., LLC*, 771 N.W.2d 14, 22 (Minn. 2009) (quotation omitted). In other words, we take the facts alleged by the plaintiff as true and consider whether they "implicate a violation of [the] law." *Grundtner*, 730 N.W.2d at 329 (quotation omitted). A report of problematic or unacceptable behavior alone is not enough to be protected; the reported activity must at least *implicate* a violation of the law. *Id.*; *see, e.g.*, *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 204 (Minn. 2000) (determining that report of safety concerns about windshield wipers did not implicate a violation of law and therefore was not protected under the MWA); *Hedglin v. City of Willmar*, 582 N.W.2d 897, 902 (Minn. 1998) (concluding report of firefighters allegedly "showing up at fire calls while drunk" did not implicate illegal conduct even though such conduct was "reprehensible").

Taking Sakrison's allegations as true, we are unconvinced that the wastewater project meeting implicated a violation of section 358.05 or any other law. Sakrison correctly points out that section 358.05 requires elected officials to take an oath of office "before transacting any of the business or exercising any privilege" of their office. Minn. Stat. § 358.05. But holding an informational meeting about an ongoing city project does not mean that newly elected city officials are engaging in unauthorized business transactions. The record evidence reveals that the mayor-elect and incoming city councilmembers merely sought to hold an educational meeting in preparation for the start of the January 2017 term. And there is no evidence to suggest that the officials planned to

take official action that would suggest a transaction of business, such as making decisions on the city's behalf during the meeting or entering into a new contract with the engineering company. Sakrison had no objective basis in fact to believe that the meeting was unlawful. *See* Minn. Stat. § 181.932, subd. 1(3).

Because there is no evidence of an order, a refusal, or an unlawful act, we conclude that Sakrison's cancellation of the meeting was not protected conduct under the MWA. *See Doe 76C*, 817 N.W.2d at 163; *Nelson*, 716 N.W.2d at 402.

B. Refusal to research health insurance

Sakrison also argues that she was terminated because she "refused to violate state law relating to health insurance." Specifically, she claims that she declined to "alter[] health benefits without union consent and contrary to a collective bargaining agreement." *See* Minn. Stat. § 471.6161, subd. 5 (2018). Sakrison maintains that "[b]y advising the newly elected officials that they could not simply seek cheaper insurance, [she] was engaging in statutorily protected conduct." The district court determined that this was not statutorily protected conduct because the city was "merely investigating cost savings that could accrue . . . through a change of insurance" and there is no evidence that the city intended to modify the insurance plan without union approval.

We agree with the district court that Sakrison's actions did not garner the protection of the MWA.[7] Sakrison was asked to follow up on a price quote; she was not directed to

[7] Sakrison's brief to this court suggests that the district court misconstrued her actions related to the health insurance quote to be a "report" rather than a "refusal" under the MWA. Even so, our decision does not falter. If treated as report, then her claim fails to implicate a violation of the law, and if considered a refusal, then there is no evidence that

take any unlawful action. And her suspicion—that the city was making unapproved changes to employee health plans—was both hypothetical and premature. We have previously rejected conduct as unprotected when the whistleblower's actions stem from mere suspicions of undeveloped illegalities. *See Grundtner*, 730 N.W.2d at 331 (explaining that an employee's apprehension of a hypothetical violation of the law could not serve as the basis for a refusal claim under the MWA); *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 556 (Minn. App. 2005) (explaining that plaintiff's comment suggesting that her employer embezzled or stole funds was not protected because she offered no evidence that employer broke the law).

In the end, the district court properly dismissed Sakrison's whistleblower allegations for failure to establish a prima facie claim under the plain meaning of the MWA. We therefore need not review the final two prongs of the *McDonnell Douglas* test.

II. The district court properly determined the city is entitled to summary judgment on Sakrison's discrimination claim.

Sakrison's second claim is for employment discrimination under the MHRA. Like whistleblower claims, Minnesota courts analyze MHRA discrimination claims under the *McDonnell Douglas* burden-shifting test. *See Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). To withstand summary judgment here, Sakrison first had to identify sufficient evidence to establish a prima facie discrimination claim; then, the

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Sakrison had any objective basis in fact to believe she had refused to violate state law. *See* Minn. Stat. § 181.932, subd. 1(1), (3); *Kratzer*, 771 N.W.2d at 22 (explaining whistleblower report must at least "implicate" a violation of the law). Either way, Sakrison's actions were not statutorily protected.

burden would shift to the city to justify its termination decision; and, finally, Sakrison would have to identify evidence sufficient to show that the city's justification was mere pretext intended to conceal its discriminatory motive. *See id.* at 444-45. "The ultimate burden of persuasion, however, never shifts, resting at all times upon the plaintiff." *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 n.2 (Minn. 1986).

"To establish a prima facie case of discriminatory discharge, an employee must show that: (1) she is a member of a protected class; (2) she was qualified for her position; (3) she was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work." *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 918 (Minn. 2012) (citing *Hubbard*, 330 N.W.2d at 442). Sakrison asserts that she is a qualified woman, who was about 65 years old when the city terminated her employment, and that a younger male assumed her duties after she was discharged. Viewing the evidence in the light most favorable to Sakrison, the district court assumed these facts established a prima facie case of discrimination. Because the record supports that determination, and the city offers no compelling argument to the contrary, we too assume, without deciding, that Sakrison identified evidence sufficient to establish a prima facie discrimination claim.

On the second prong of the *McDonnell Douglas* test, the city maintains Sakrison committed several forms of employment misconduct. In particular, the city has consistently relied on the investigative report prepared and provided to the city council just before Sakrison's termination. The report details five allegations of misconduct that were substantiated by a third-party investigator: (1) providing email access to a terminated employee engaged in litigation with the city; (2) failing to provide the city council with

requested information; (3) preventing officials from holding the wastewater project meeting; (4) promising a job to a potential job applicant, and making inappropriate comments regarding an applicant's gender; and (5) showing a lack of professionalism and behaving in an "openly hostile and sarcastic" manner. In its brief to this court, the city reiterates that the reasons for Sakrison's termination include that she "acted unprofessionally, in a hostile manner, and in [a] manner that was not forthright." The district court concluded that Sakrison was terminated for legitimate reasons. And because the city has offered evidence in support of facially legitimate, nondiscriminatory reasons for Sakrison's termination, we next consider whether she has identified evidence sufficient to show that the city's explanation is actually pretext for its discriminatory motives.

A plaintiff may satisfy the third *McDonnell Douglas* prong directly by persuading the court that the employer's motives were discriminatory, or by showing that the employer's stated rationale is "unworthy of credence." *Aase v. Wapiti Meadows Cmty. Techs. & Servs., Inc.*, 832 N.W.2d 852, 859 (Minn. App. 2013), *review denied* (Minn. Aug. 6, 2013). Again, the burden of persuasion remains with Sakrison to convince the fact-finder that the real reason for her termination was discrimination. *See Sigurdson*, 386 N.W.2d at 720-21. The district court noted that the investigation into Sakrison's misconduct revealed no evidence of unfair discrimination, underscoring that "the record is replete with undisputed facts that [Sakrison]'s termination was for a legitimate non-retaliatory reason."

Sakrison urges on appeal that the city's justifications are illegitimate and "unworthy of credence" for various reasons. She mainly focuses on the content of her email

communication with the IT administrator leading up to and after his termination. But her arguments are unpersuasive and she offers no rebuttal to a majority of the substantiated allegations detailed in the investigative report. At best, she has rebutted a fraction of the substantiated misconduct. In some cases, even where an employer has given a legitimate reason for the discharge, a plaintiff may prevail if an illegitimate reason more likely than not motivated the discharge decision. C*ox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 497 (Minn. App. 1996) (citations omitted). This is not one of those cases. Sakrison has offered no evidence of pretext for age or gender discrimination. That a younger male assumed her duties after she was terminated is, by itself, insufficient to carry her burden of persuasion.

Sakrison failed to present evidence sufficient to establish that the city's reasons for her termination were a pretext for discrimination. Thus, the district court properly granted summary judgment on Sakrison's MHRA discrimination claim.

III. The district court properly determined that Sakrison's defamation claim fails as a matter of law.

Finally, Sakrison challenges the district court's grant of summary judgment on her defamation claim against the city. To survive summary judgment, a defamation plaintiff must show that a genuine issue of material fact exists as to each element of the claim. Defamation consists of four elements: "(1) the defendant made a false and defamatory statement about the plaintiff; (2) the statement was an unprivileged publication to a third party; (3) the statement had a tendency to harm the plaintiff's reputation in the community; and (4) the defendant was at fault." *DeRosa v. McKenzie*, 936 N.W.2d 342, 345 (Minn. 2019); *see MacDonald v. Brodkorb*, 939 N.W.2d 468, 475 (Minn. App. 2020) (explaining

that defamation involving a plaintiff's profession or trade is "defamation per se") Thus, we consider whether Sakrison has raised a genuine issue of material fact on each element of her defamation claim.

Here, we begin our review with the second element, which inherently recognizes two types of privilege that serve as a defense to defamation claims—absolute privilege and qualified privilege. *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010). "Even if every element of a defamation claim is established, a speaker is not liable if an absolute or qualified privilege protects the defamatory statement." *Larson v. Gannett Co., Inc.*, 940 N.W.2d 120, 131 (Minn. 2020), *cert. denied sub nom. Gannett Co., Inc., v. Larson*, No. 20-252, 2020 WL 6037250 (U.S. Oct. 13, 2020). Both forms of privilege cover statements made by various types of public officials so that they may exercise their duties free from fear of liability for defamation. *Zutz*, 788 N.W.2d at 62. At issue is the principle of qualified privilege, which grants immunity to a speaker so long as "the privilege is not abused and defamatory statements are publicized in good faith and without malice." *Id.* When the person challenging a defamatory statement is a public official, the person must prove actual malice. *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019). Actual malice means that a statement was made "with the knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (quotation omitted).

Sakrison alleges that the city defamed her character through five statements: (1) "the Plaintiff's contract was 'criminal'"; (2) "we have emails showing privileged information had been forwarded to an ex-employee"; (3) "there were things going on that shouldn't have been"; and (4) "we can't continue with someone who puts the city at risk.

It's not about job performance, but about things that were done"; and (5) "confidential information was given out." The district court determined that the first statement was not attributable to the city, only to the mayor-elect before she was elected mayor, and that the remaining statements were protected by qualified privilege. Sakrison now argues that the district court erred in applying the doctrine of qualified privilege because the city's statements were made with actual malice. But Sakrison offers no argument about whether the city's representatives knew their statements about Sakrison were false or made the statements in reckless disregard of whether they were false. We cannot assign error from mere assertions unsupported by argument or evidence. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), *review denied* (Minn. Apr. 26, 2017).

Even though the existence of actual malice is usually a jury question, summary judgment is warranted if the plaintiff produces no evidence of malice. *Wallin v. Minn. Dep't of Corr.*, 598 N.W.2d 393, 402-03 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999). Absent any such evidence here, we determine that the district court properly applied the qualified privilege doctrine and concluded the statements were protected. Minnesota caselaw provides that statements made by city officials during city council meetings—as were the majority of statements alleged here—are protected. *See Zutz*, 788 N.W.2d at 62 (explaining that qualified privilege applies to local governing bodies such as city councils or county boards). Likewise, the district court aptly recognized that scrutinizing a public employee's job performance is typically not considered defamation. *See, e.g.*, *Diesen v. Hessburg*, 455 N.W.2d 446, 450-52 (Minn. 1990). In the words of the district court, the

disputed statements were "nothing more than a frank discussion of the City's concerns regarding [Sakrison]'s performance as a city clerk."

"Summary judgment is appropriate when a governmental entity has established that its actions are immune from civil liability." *Brown v. City of Bloomington*, 706 N.W.2d 519, 522 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). After thorough review, we conclude that the city has established its actions are immune from civil liability and affirm the district court's grant of summary judgment on Sakrison's defamation claim.

Affirmed.