STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0004

Barbara Henry,
Appellant,

vs.

Independent School District #625,
a/k/a Saint Paul Public Schools,
Respondent.

Filed July 26, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge

Ramsey County District Court
File No. 62-CV-19-4732

Jeffrey D. Schiek, Philip G. Villaume, Villaume & Schiek, P.A., Bloomington, Minnesota (for appellant)

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

SYLLABUS

In addition to discharge and constructive discharge, an employee can show she suffered an adverse employment action by presenting evidence of circumstances that, when considered cumulatively, could lead a reasonable juror to conclude that the employee experienced a tangible change in working conditions that produced a material disadvantage to the employee's employment.

OPINION

FLOREY, Judge

Appellant challenges the summary-judgment dismissal of her age-discrimination claim under the Minnesota Human Rights Act (MHRA). Minn. Stat. § 363A.08 (2020). Appellant asserts that the district court erred by determining that she did not present sufficient evidence of (1) a prima facie case to sustain her disparate-treatment age-discrimination claim or (2) an age-based hostile work environment. We conclude that the record evidence creates a genuine issue of material fact as to whether appellant suffered discrimination, based on her age, with respect to the terms of her employment. The record evidence is insufficient, however, to establish the existence of an age-based hostile work environment. Therefore, we affirm in part, reverse in part, and remand.

FACTS

Appellant Barbara Henry sued her former employer, respondent St. Paul Public Schools (SPPS), alleging that SPPS engaged in age discrimination in violation of the MHRA. The following facts are undisputed:

Henry was hired by SPPS's technology services department as a network technician I in 1997. She was promoted to network technician II in 2007 at the age of 47. Henry was part of the technology services infrastructure team, and she worked primarily on maintaining the district's wireless connectivity and wide area network. Henry received excellent performance reviews for most of her career at SPPS, and her former supervisors and colleagues spoke highly of her work ethic and performance.

In 2014, SPPS hired Idrissa Davis as deputy chief of technology services. In 2016, Davis hired Sonya Zuker[1] to be the director of production services and Vicky Shine to be the technology services manager. From that point on, Henry reported to Shine, Shine reported to Zuker, and Zuker reported to Davis.

In the fall of 2016, Zuker and Shine performed the first formal performance reviews of the infrastructure group since Davis was hired. The evaluations rated whether employees' performance was below standards, met standards, or exceeded standards. Henry received a below-standards rating. Her performance review identified specific examples of deficiencies—including rarely meeting deadlines, a lack of visibility during work hours, failure to use an SPPS van for travel (as required by SPPS policy), and speaking to director Zuker in an agitated voice.

On November 4, 2016, Zuker wrote a letter explaining her recommendation to place Henry on a Performance Improvement Plan (PIP). The letter stated, in pertinent part:

> After reviewing the job description of Network Technician 2 . . . Barb's day-to-day work performance addresses superficially 50% of the responsibilities. When unpacking what those responsibilities entail, Barb is managing a fraction of the required work . . . .
>
> . . . .
>
> On several occasions, Barb Henry has been resistant to: adopting processes, providing additional assistance to non-wireless projects, completing tasks as assigned or within established parameters, and completing tasks by deadlines. Additionally, Barb has demonstrated a lack of self-control when faced with uncomfortable situations.

[1] We are using this spelling of Sonya Zuker because it is the spelling used in the record, but we note that appellant's brief spells her last name as "Zucker."

The letter concluded:

> With the overview provided above, I support the decision to place Barb Henry on a Performance Improvement Plan to address the following:
>
> - Meeting deadlines
> - Utilizing opportunities for success
> - Performing all responsibilities as outlined in Job Description
> - Providing training to team members around areas of expertise
> - Documenting processes to allow for other Network Technician 2's to perform similar work
> - Improving relationships with peers, supervisor and leadership team

Henry received another written performance review from Shine on November 22, 2016. Henry again received an overall below-standards rating. The November performance review identified specific examples of the deficiencies that led to the below-standards ratings—including missing deadlines, not responding to requests, missing a meeting, continuing to use her personal vehicle rather than the SPPS van, and failing to share her knowledge with other coworkers.

On November 22, 2016, a PIP was delivered to Henry, requiring the following improvements:

- "[P]rioritize and manage multiple tasks. Remain focused on the task at hand so that it can be completed in a timely manner but also maintain flexibility to switch gears if necessary and reprioritize as things come up";
- "Be able to meet deadlines to 100% completion";
- "Work out a plan to complete all assigned projects in a timely manner and inform her manager ahead of time

should she require additional time and resources to meet appropriate deadlines";

- "Proactively identify knowledge gaps and initiate solutions on how to close those gaps";
- "Report to [the office] at the beginning and end of her shift. . . . [C]ommunicate with her manager prior to the start and end times as soon as there is a deviation";
- "[R]emain visible throughout the day and inform [manager] of her whereabouts if outside of the office";
- "Ensure attendance for all scheduled meetings";
- "[U]se the District van provided to Technology Services when visiting sites to resolve issues. Ms. Henry will not be reimbursed for mileage when a personal vehicle is used";
- "[U]se remote tools to troubleshoot wireless and phone issues whenever possible";
- "[I]nitiate and request additional training and resources to efficiently perform all job duties"; and
- "[C]oordinate the cross training and transfer of knowledge to members of the team when requested to do so."

In April 2017, Shine performed a follow up review of Henry's performance. Henry again received a below-standards rating overall. The post-PIP review again identified specific examples of Henry's performance deficiencies, including: gaps in knowledge of required information, problems following through on requests, missing deadlines, problems with visibility and abiding by the required work schedule, submitting mileage reimbursement requests for her personal vehicle despite being asked to use the SPPS van, and failing to follow through on career development and training opportunities. Considering the deficiencies identified in the post-PIP review, Shine recommended that SPPS terminate Henry's employment.

On May 5, 2017, Davis wrote a letter to Henry explaining that he was considering terminating her employment for failing to meet the terms of the PIP. The letter advised Henry that before Davis made a termination decision, she could present a statement in her defense directly to Davis with her union representative present. Instead, under the advice of her union representative, Henry retired before the meeting occurred. She was 57 years old.

In September 2017, Henry filed a charge of discrimination with the Minnesota Department of Human Rights, alleging age discrimination by SPPS. The department investigated Henry's claims, but ultimately dismissed Henry's charge, finding no probable cause to conclude that discrimination had occurred. Henry then filed a complaint in district court, alleging that SPPS had engaged in age discrimination in violation of the MHRA.

Supervisor and Employee Testimony

During the discovery process, counsel deposed several of Henry's former supervisors and co-workers. Zuker testified that Henry was "specifically target[ed]" for "performance" issues and that Davis instructed her "to make it look like she was not performing." She said that she believed Henry's below-standards performance reviews and PIP were "exaggerated." Zuker testified that, although she did not believe that the statements made in Henry's performance reviews were false, she would have addressed Henry's performance issues by coaching and mentoring Henry instead of placing her on a formal PIP.

Zuker further testified that Davis directed her to write the PIP in a way that Henry could not pass. Zuker specifically testified about notes she took during a meeting with

Davis on March 27, 2017. She stated that Davis instructed her to make Henry's PIP "unrealistic" and to pile on extra work so Henry would fail and not pass the performance evaluation, which would ultimately lead to her termination. In her notes, Zuker wrote "[Henry]–out by May–rehire." Zuker testified that in her opinion, Henry's PIP was "unwarranted" and that she did not believe that disciplinary action should have been taken against Henry. She also explained that Davis used PIPs to force employees out by either forcing them to resign or terminating them.

Zuker also testified that on one occasion, Davis instructed her to not allow Henry to participate in a training. Zuker explained that this was because Henry was being "performance managed," so "rather than train [her] up so [she] can perform better, just take away formal training and not spend the money on the person."

Zuker testified that she did not recall Davis ever saying anything about Henry's age, and she stated about the department generally:

> If I look at the track record of who is—who was asked to leave or forced to leave, they are all of our older staff, you know, for whatever reason, whether it's salary, whether it's specifically age, all of our staff who were forced out, whether to make their lives miserable or because they were picked out, they are all of our older staff.

James Dykstra, a co-worker and Henry's supervisor for one year, testified that he believed Davis was targeting older employees so he could bring in younger employees. He also testified that he believed Davis discriminated against Henry based on her age and that while he managed Henry, her work was exceptional. He also recalled Davis saying that

"problems within the department are because people are too old and that they're overpaid white people."

Bryan DeGidio, one of Henry's former supervisors, testified that there was a pattern of management trying to get rid of older employees with a lot of service and replacing them with younger employees. He described Davis's management style as "hostile." He also testified that while he managed Henry for approximately 15 years, she performed her job at a level that "exceed[ed] standards" in "absolutely all categories."

Carla Gabriel, a former co-worker, also testified that she believed that there was "a pattern" of Davis getting rid of older employees to replace them with younger employees. She stated that "every month or every few months," a different person over 40 was "gone." Gabriel further testified that Davis specifically targeted Henry and that Henry's placement on a PIP was "unfounded," noting that Henry was being disciplined for things that other employees routinely did. Specifically, Gabriel explained that other employees were driving their personal vehicles rather than driving the SPPS van, but Henry was "the only one that was singled out for it." She also stated that it was common for Davis "to belittle or mock" and yell at people during meetings.

Henry testified that by the time she received Davis's May 2017 letter, she believed that she was being discriminated against based on her age. She explained that she believed that SPPS was targeting her based on her age because she was at the top of her pay scale and because budget cuts were anticipated. She further testified that she heard Davis remark that most of the network team was "nearing retirement, so within the next five years, you know, there will be a turnover."

SPPS filed a motion for summary judgment. In its order granting the motion, the district court wrote:

> It is undisputed that several of Mr. Davis' employees found him "hostile, abusive and confrontational" and that his management style fostered a culture of retaliation. It is further undisputed that at least seven employees, including [Henry], have now alleged that their jobs were eliminated or they were forced out of their position by Mr. Davis because of their age and high salary.

The district court ultimately concluded that Henry "failed to show the existence of a fact dispute that would bar the Court from ruling on her claim" and that Henry "voluntarily resigned her position without taking advantage of [SPPS's] anti-discrimination policies," causing her claim to fail under the MHRA.

Henry appeals.

ISSUES

1. Do genuine issues of material fact exist precluding summary judgment on Henry's disparate-treatment age-discrimination claim?

2. Do genuine issues of material fact exist precluding summary judgment on Henry's age-based hostile work environment claim?

ANALYSIS

Summary-Judgment Standard

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 the evidence could lead a rational fact-finder to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Henry raises two theories of discrimination: a disparate treatment based on age and an age-based hostile work environment. We will address each in turn.[2]

I. MHRA Disparate-Treatment Age-Discrimination Claim

Henry alleges that SPPS violated the MHRA by discriminating against her because of her age. The MHRA provides that an employer may not, because of age, "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08, subd. 2(3) (2020). Under the MHRA, "[t]he prohibition against unfair employment or education practices based on age prohibits using a person's age as a basis for a decision if the person is over the age of majority." Minn. Stat. § 363A.03, subd. 2 (2020). In construing the MHRA, we apply Minnesota caselaw and "law developed in federal cases arising under Title VII of the 1964 Civil Rights Act." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Under the MHRA, an age-discrimination plaintiff alleging disparate treatment can use either of two methods to survive summary judgment: (1) the direct method of proof or (2) the three-part burden-shifting test set out in *McDonnell Douglas Corp. v. Green*, 411

[2] Henry's complaint alleges only a single count of age-based discrimination under the MHRA. Based on our de novo review of the complaint and record, we determine that Henry has sufficiently alleged a disparate-treatment age-discrimination and hostile-work-environment claim.

U.S. 792, 98 S. Ct. 1817 (1973). *Goins v. W. Grp.*, 635 N.W.2d 717, 724 (Minn. 2001). Henry contends that she submitted sufficient direct evidence to survive summary judgment, or alternatively, that she submitted sufficient circumstantial evidence to survive the *McDonnell Douglas* analysis.

A. Direct Evidence of Age Discrimination

We first address Henry's claim that she presented sufficient direct evidence of age discrimination to survive summary judgment. Direct evidence shows a "specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Aulick v. Skybridge Ams., Inc.*, 860 F.3d 613, 620 (8th Cir. 2017) (quotation omitted); *see also Naguib v. Trimark Hotel Corp.*, 903 F.3d 806, 811 (8th Cir. 2018) ("Direct evidence shows a specific link between the alleged animus and the termination sufficient to support a substantially strong inference that the employer acted based upon that animus." (quotation omitted)). Direct evidence "may include evidence of actions or remarks of the employer that reflect a discriminatory attitude, comments which demonstrate a discriminatory animus in the decisional process, or comments uttered by individuals closely involved in employment decisions." *King v. United States*, 553 F.3d 1156, 1161 (8th Cir. 2009) (quotation omitted). "But stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process do not constitute direct evidence." *Aulick*, 860 F.3d at 620 (quotation omitted).

Henry contends that the following constituted direct evidence of age discrimination: Zukers's testimony that Davis wanted her to design the PIP so that Henry would fail; the testimony that negative portions of the performance reviews were exaggerated; Davis's comment that problems within the department were "because people are too old" and Henry's former supervisors' and co-workers' statements that Davis discriminated against her because of her age. Henry argues that Davis's comment in particular is enough to allow her claim to survive summary judgment. She cites to *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir. 1991) in support of her argument. There, the Eighth Circuit Court of Appeals determined that the plaintiff presented direct evidence of age discrimination where at least five employees testified that they heard the company's president make a statement to the effect that "older employees have problems adapting to changes and to new policies," and at least one of the comments was made in relation to the employer's decisional process as it pertained to the employment decisions in controversy. *Id*. at 1354. Here, however, Henry only presented evidence from one manager that Davis made an age-based comment and, more importantly, there is no evidence that Davis made this comment in relation to the decisional process.

Giving Henry the benefit of all reasonable inferences supported by the evidence, we conclude that the record does not contain direct evidence of age discrimination sufficient to withstand summary judgment.

B. *McDonnell Douglas* Analysis

Because Henry did not present direct evidence of disparate treatment, we consider whether Henry's claim survives summary judgment under the *McDonnell Douglas* burden-

shifting analysis. *See Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995) (applying *McDonnell Douglas* test to claim under MHRA). There are three steps in the *McDonnell Douglas* analysis: first, the plaintiff must establish a prima facie case of discrimination; second, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct; and third, the plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Id*. The district court concluded that Henry did not meet the first step of the *McDonnel Douglas* analysis by showing a prima facie case of age discrimination, and as a result, neither the district court nor the parties addressed the other steps. Because we conclude that Henry did present sufficient evidence to meet the first step of the test, we need only address this step.

1. Prima Facie Case of Age Discrimination

To establish a prima facie case of age discrimination, Minnesota courts generally require a plaintiff to show that: (1) she belongs to a protected class; (2) she is qualified for the position; (3) she was discharged; and (4) she was replaced by a person outside of the protected class. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995); *see also, e.g., Elliott v. Montgomery Ward & Co.*, 967 F.2d 1258, 1260 (8th Cir. 1992). But the requirements of the prima facie case for employment discrimination may vary depending on the circumstances involved. *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S. Ct. at 1824 n.13; *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 997-98 (2002) (observing that the required prima facie operates as a "flexible evidentiary standard" that was "never intended to be rigid,

mechanized, or ritualistic"); *Friend v. Gopher Co.*, 771 N.W.2d 33, 37 (Minn. App. 2009) (noting that the prima facie case "varies depending on the type of employment decision" and explaining that the purpose of the prima facie case is "to disprove the most obvious legitimate bases for the employment decision, thereby allowing the inference that the decision was motivated by discrimination"). If a plaintiff establishes a prima facie case, she creates a presumption that the employer unlawfully discriminated against her. *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). The burden of establishing a prima facie case is not onerous. *Id*. at 253, 101 S. Ct. at 1094.

To survive summary judgment, Henry was required to allege facts that establish a prima facie case of age discrimination. Therefore, to establish a prima facie case of age discrimination under the facts of this case, we determine that Henry must allege facts that show that (1) she is a member of the protected class; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) circumstances exist that give rise to an inference of discrimination. *See, e.g., Rahlf v. Mo–Tech Corp*., 642 F.3d 633, 637 (8th Cir.2011) (applying same test to analyze age-discrimination claim); *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) (applying this prima facie test to analyze a pregnancy-discrimination claim); *Wheeler v. Aventis Pharm.*, 360 F.3d 853, 857 (8th Cir. 2004) (using same test to analyze race-discrimination claim).

There is no dispute that the evidence, viewed in a light most favorable to Henry, would support a finding that Henry is a member of a protected class and that she was qualified for her position. We therefore turn our attention to whether Henry produced

sufficient evidence to establish that she suffered an adverse employment action and that circumstances exist that support an inference of discrimination.

i. Adverse Employment Action

To survive summary judgment on the third element, Henry must point to evidence sufficient to prove that she suffered an adverse employment action. "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 853 (8th Cir. 2000); *see also Jones v. Fitzgerald*, 285 F.3d 705, 714 (8th Cir. 2002) (stating that the Eighth Circuit has "consistently held a change in non-tangible working conditions, no matter how unpleasant, fails to constitute a 'material employment disadvantage' necessary to establish an adverse employment action").

An employee can prove an adverse employment action by presenting evidence of either her discharge or constructive discharge. *See Pribil*, 533 N.W. 2d at 412. But, the concept of an adverse employment action is broader than proof of discharge or constructive discharge, and may also be proved if an employee presents evidence that, when considered cumulatively, could lead a reasonable juror to conclude that she suffered "a tangible change in working conditions that produces a material employment disadvantage." *Spears*, 210 F.3d at 853; *see e.g. Phillips v. Collings*, 256 F.3d 843, 848-49 (8th Cir. 2001).

The evidence, when viewed in the light most favorable to Henry, shows that during Davis's tenure as director, SPPS: (1) initiated three performance evaluations of Henry in less than a year, even though a performance evaluation had not been completed for approximately two years; (2) exaggerated Henry's trivial performance issues, and used the

exaggerated issues to support disciplinary action; (3) placed Henry on an unachievable PIP with the intent of causing her to either resign or be terminated; (4) issued a written letter threatening to terminate Henry if she did not accomplish the goals set out in the unachievable PIP; (5) reprimanded Henry for conduct more harshly than other employees; (6) specifically denied Henry the opportunity to attend a training session; and (7) made comments through Davis that the problems within the department were because people "are too old" and permitted Davis to create an environment where employees were reluctant to report discriminatory conduct as they believed it could jeopardize their positions.

A reasonable juror could find that Henry's placement on an unachievable PIP—based on performance reviews consisting of allegedly trivial and exaggerated allegations—constituted a material disadvantage to Henry's employment, particularly when considering that Henry presented evidence that the PIP was put in place with the intent to cause Henry to either resign or be terminated. More importantly, a reasonable juror could find that the cumulative effect of SPPS's actions caused Henry to suffer an adverse employment action. *Cf. Wilson v. Miller*, 821 F.3d 963, 967 (8th Cir. 2016) (explaining that an unfavorable performance evaluation is actionable as an "adverse employment action" when the employer subsequently uses the evaluation as a basis to detrimentally alter the terms and conditions of the recipient's employment); *Ellis v. Houston*, 742 F.3d 307, 323-24 (8th Cir. 2014) (holding that evidence showing that the plaintiff was "singled out for additional work details" and the subject of "reports for trivial or unsubstantiated allegations" that could support disciplinary action could establish an adverse employment action); *Phillips*, 256

F.3d 843 at 848-49 (finding that "uncharacteristically long and extraordinarily negative" performance evaluation that was "like no other received by [plaintiff] or any of his co-workers," when combined with a "Corrective Action Plan" and mandatory "remedial training," constituted adverse employment action); *Benner*, 380 F. Supp. 3d at 897–98 (D. Minn. 2019) (concluding that the "cumulative effect" of the defendant's actions, which included reprimands, investigations, and other conduct, precluded summary judgment). Therefore, we determine that a genuine issue of material fact exists as to whether Henry suffered an adverse employment action based on the cumulative evidence she submitted.

Henry also argued before the district court and argues on appeal that she was constructively discharged. To establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to resign or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Pribil*, 533 N.W.2d at 412-13. Constructive discharge is considered objectively, and arises "only when a reasonable person would find the conditions of employment intolerable." *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996).

Here, a reasonable juror could find that the facts as listed above, when viewed in the light most favorable to Henry, created intolerable working conditions. Further, Zuker's testimony that Davis instructed her to place Henry on a PIP and ensure she was "out by May" so that the department could rehire is evidence that Davis had the intent to force Henry to quit. Therefore, we determine that a genuine issue of material fact exists as to whether Henry was constructively discharged.

SPPS argues that Henry cannot claim constructive discharge because she unreasonably failed to take advantage of alternative corrective measures offered by SPPS, and therefore SPPS can invoke the *Frieler* affirmative defense. The *Frieler* defense allows an employer to avoid liability against an employee's claim of hostile work environment by showing both (1) "that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Frieler v. Carlson Mktg. Group*, 751 N.W.2d 558, 570-71 (Minn. 2008) (quotations omitted). But, the Minnesota Supreme Court has declined to extend the *Frieler* defense beyond hostile-work-environment claims, and we decline to do so here. *See Schmitz v. U.S. Steel Corp*., 852 N.W.2d 669, 678 (Minn. 2014) (declining to extend the affirmative defense to claims beyond hostile-work-environment sexual harassment). As such, the *Frieler* defense is inapplicable to Henry's claim of an age-based disparate-treatment-discrimination claim.

ii. Inference of Discrimination

To prove the fourth element of the prima facie case, Henry must show that circumstances exist that give rise to an inference of discrimination. A plaintiff can satisfy the fourth part of the prima facie case in a variety of ways, such as by showing biased comments by a decisionmaker. *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1019 (8th Cir. 2011) (quotations omitted). And evidence of pretext, which is normally considered at the third step of the *McDonnell Douglas* analysis, may also satisfy this aspect of the plaintiff's prima facie case. *Putman v. Unity Health Sys.*, 348 F.3d 732, 736 (8th Cir. 2003). Thus, viewing

the evidence in a light most favorable to Henry, we conclude that there is a genuine issue of material fact as to whether circumstances exist that give rise to an inference of discrimination.

In *Ryther v. Kare 11*, the Eighth Circuit Court of Appeals determined that evidence demonstrating a "general pattern of discrimination against older employees"—which included comments about the plaintiff being an "old man" and an "old fart" and saying he was "too old to be on the air"—supported an inference of discrimination. 108 F.3d 832, 842-44 (8th Cir. 1997) (quotation omitted). The court noted that, while stray remarks alone do not give rise to a reasonable inference of age discrimination, "such evidence *can*, if sufficient together with other evidence of pretext, support a reasonable inference of age discrimination." *Id*. at 842. "Other evidence" that may be relevant includes evidence of the employer's "general policy and practice with respect to older persons' employment." *Id*. (quotation omitted).

The most persuasive evidence in support of an inference of discrimination is Davis's statement that the problem in the department was the "old people." The testimony from the technology services employees and supervisors about the retaliatory culture created by Davis and his intent to replace older, higher paid employees with younger, cheaper ones is also relevant. *Cf. MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1057-58 (8th Cir. 1988) (observing, in a similar context, that evidence showing a decline in the ratio of older employees to younger employees "is certainly not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this

outcome"). While much of this testimony can be described as no more than the employees' opinions of Davis's conduct, which is insufficient to support Henry's argument that her age was a determining factor in SPPS's conduct, there is evidence of a pattern of employees over the age of forty either being terminated from or leaving the technology-services department during Davis's tenure.

Thus, while the statement of Davis alone is not, in itself, sufficient to sustain Henry's claim, it is relevant evidence which, together with other evidence of age discrimination—such as the purported pattern of eliminating older and higher-paid employees and the evidence of exaggerated performance reviews and an intentionally unachievable PIP—creates a genuine issue of material fact as to whether discrimination occurred. Accordingly, we conclude that the record, when considered in the light most favorable to Henry, supports a reasonable inference that age discrimination motivated SPPS's conduct towards Henry.

Henry produced sufficient evidence to establish a prima facie case of disparate-treatment age discrimination. Genuine issues of material fact exist that preclude summary judgment on that theory. Therefore, we reverse the district court's grant of summary judgment and remand for further proceedings on this theory.

II. Age-Based Hostile Work Environment

Henry also claims that SPPS, and in particular Davis, created a hostile work environment based on her age. To succeed on a hostile-work-environment theory, a plaintiff must show that (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the protected

group status; (4) the harassment affected a term, condition, or privilege of her employment; and (5) the defendant knew or should have known of the harassment and failed to take proper action. *Tademe v. St. Cloud State Univ.*, 328 F.3d 982, 991 (8th Cir. 2003). "Even if a plaintiff demonstrates discriminatory harassment, such conduct is not actionable unless it is so severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment." *Goins*, 635 N.W.2d at 725 (quotations omitted). The objectionable environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 2283 (1998). In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 787–88, 118 S. Ct. at 2283 (quotation omitted).

Here, the record does not support Henry's claim. While a number of technology-services employees assert that Davis created a hostile work environment, their perception is not sufficient to make out a hostile-work-environment claim. *See Sanders v. Lee Cnty. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012) (explaining that "[t]he intolerability of working conditions is judged by an objective standard, not the employee's subjective feelings" (quotation omitted)). Further, the conduct at issue here does not rise to the level of pervasiveness or severity required to sustain a hostile-work-environment claim.

Because no genuine issue of material fact exists, and SPPS is entitled to judgment as a matter of law, the district court did not err by granting summary judgment on this issue.

DECISION

We conclude that Henry presented sufficient evidence of disparate-treatment age discrimination to withstand summary judgment, and we reverse and remand on that claim. We affirm summary judgment on Henry's age-based hostile-work-environment claim.

Affirmed in part, reversed in part, and remanded.