STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0101

Debra Lynn Johnson,
Appellant,

vs.

SICO America, Inc.,
Respondent.

Filed September 13, 2021
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-19-19613

Debra Lynn Johnson, Eden Prairie, Minnesota (pro se appellant)

Craig A. Brandt, Megan J. Renslow, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Johnson, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant-employee argues the district court erred by finding that her Minnesota Human Rights Act age-discrimination claim was time-barred and by granting summary judgment for respondent-employer. Because we conclude that the district court's grant of summary judgment may be sustained on the merits, we affirm.

FACTS

Respondent SICO America, Inc., (SICO) is a Minnesota-based manufacturing company that designs and manufactures long-lasting, mobile, folding products—like tables and stages—to help organizations make effective use of their space. SICO hired appellant Debra Lynn Johnson (Johnson) as a space designer in the marketing department in 1978. In 2015, SICO hired 57-year-old Patricia van der Lugt (van der Lugt) as its director of marketing. Upon joining SICO, van der Lugt became Johnson's direct supervisor. Johnson's dissatisfaction with SICO, and van der Lugt's dissatisfaction with Johnson, began shortly after Johnson started reporting to van der Lugt.

In her affidavit, van der Lugt affirmed that she first noticed "a recurring pattern of a need to follow up with [Johnson] on work assignments" starting in 2015. According to van der Lugt, Johnson frequently failed to complete projects on time and would often communicate that projects were complete when they were not actually finished. Johnson's skills in the technology-based aspects of her job also fell below van der Lugt's expectations, particularly Johnson's ability to use Revit, a three-dimensional space planning software that allows designers to create visual representations of rooms. Johnson's annual performance evaluation for 2015, which had feedback from Johnson's colleagues, contained the comment that Johnson "[c]ould improve on timeliness of projects and show a greater sense of urgency." The vast majority of Johnson's colleagues, however, found her to be "pleasant to work with." And van der Lugt signed Johnson's 2015 performance appraisal, which stated that Johnson's overall job performance was "[e]xcellent," the highest rating possible.

Between 2015 and 2016, personnel in the marketing department changed. In 2015, SICO fired two individuals. That same year, van der Lugt hired J.S. as an advertiser. When J.S. joined SICO, he was in his twenties. Then in 2016, Johnson's colleague and fellow space designer resigned from SICO and van der Lugt hired L.E. to fill the vacant space designer position because of her knowledge of Revit. When L.E. joined SICO, she was in her early forties. From March 2016 on, van der Lugt's direct reports were Johnson, J.S., and L.E.

Johnson felt that her relationship with van der Lugt was different from the relationship that van der Lugt had with J.S. and L.E. According to Johnson, the relationship between van der Lugt and J.S. was "atypical," and she described an instance in which van der Lugt invited J.S. to her home to take photos of a new SICO product. J.S. and van der Lugt drank alcohol during the photoshoot and J.S. "wound up staying the night because he couldn't drive home." Van der Lugt never invited Johnson to her home. Similarly, van der Lugt included J.S. and L.E. on work trips with her, but never included Johnson, which a SICO employee testified "seemed strange." When Johnson asked van der Lugt why she was not invited to attend the work trips van der Lugt responded, "Why do you think?" At work, van der Lugt left Johnson out of team meetings and lunches. At one point, after Johnson told van der Lugt that years ago she taught herself to use a computer program, van der Lugt told Johnson that she wanted "the old [Johnson] back" who had tried to bring new ideas and technology into the marketing department.

Continuing into the latter part of 2016, van der Lugt's dissatisfaction with Johnson and her work product grew. In October, van der Lugt sent Johnson an email stating that a

project Johnson completed in Revit was not "acceptable work." But Johnson had requested more training in Revit the year before and van der Lugt denied the request. Van der Lugt directed Johnson to send all future Revit jobs to van der Lugt for approval before sending them to customers. Further, van der Lugt asked Johnson to set up a meeting to discuss how she planned to address the inconsistencies in her work. In November 2016, Johnson failed to timely report her weekly projects, contrary to van der Lugt's instructions.

In Johnson's annual performance evaluation for 2016, van der Lugt said that her overall job performance "[n]eeds [i]mprovement," which was the second to lowest rating possible. Johnson disagreed with van der Lugt's evaluation of her performance and expressed her concerns to SICO's human resources manager (HR manager). Johnson told HR manager that she felt van der Lugt was trying to force her out of her position. HR manager told Johnson to keep track of and document her concerns with van der Lugt, but HR manager took no further action. In the employee comments section of her performance evaluation, Johnson wrote that she disagreed with some comments made about her work performance. Yet both Johnson and van der Lugt signed Johnson's 2016 performance evaluation.

In 2017, van der Lugt continued to be displeased with Johnson's work performance. Throughout the year, van der Lugt sent Johnson multiple emails explaining her dissatisfaction with Johnson's ability to prioritize work, manage deadlines, multi-task, and track details. In April 2017, van der Lugt recommended to SICO's president (president) that the company place Johnson on a performance improvement plan. In June 2017, van

der Lugt met with SICO's chief executive officer (CEO) to discuss Johnson's work performance.

Later that month, president met with Johnson and informed her that van der Lugt was not satisfied with Johnson's work performance. President stated that van der Lugt would continue to assign Johnson space design projects that she determined were a good fit for Johnson, but that Johnson would also be asked to handle additional responsibilities including completing projects for president as his executive assistant and working as the receptionist. Johnson told president that she "wasn't happy," "wanted to keep her job," and felt like the change in her job duties was "age discrimination." President became upset that Johnson used the word "discrimination," and stated that since she did, he needed to call human resources into the meeting. HR manager joined the meeting and stated that she felt it would be more appropriate for Johnson to go on a performance improvement plan, rather than changing her role at SICO.

In July 2017, HR manager and van der Lugt met with Johnson to discuss a proposed performance improvement plan. Because Johnson felt the proposed performance improvement plan was too difficult, SICO prepared an updated performance improvement plan and gave it to Johnson in early August 2017. Two days later, Johnson met with SICO's chair (chair) whom she knew well from working for the company for nearly four decades. Johnson told chair that the issues that van der Lugt raised about her job performance were not true and were making her look like a bad employee. Chair stated that he told van der Lugt that she could not place Johnson on a performance improvement plan because SICO does not do that "to long-term employees."

That same day van der Lugt sent Johnson an email with the subject line of "Moving Forward." In the moving forward email, van der Lugt stated that Johnson would not be placed on a performance improvement plan, and instead, she would relocate from the marketing department to a cubical outside of chair's office. The email also stated that while Johnson would be provided a computer that was equipped with computer automated design software, she would no longer work in Revit, have access to the space design mailbox, or schedule space design jobs. Rather than taking the next job on the project list, Johnson would now be assigned design projects and other tasks by both van der Lugt and L.E. Under this new arrangement, all of Johnson's space design projects needed to be sent to L.E. for approval before they could be sent to a customer, even though Johnson continued to report to van der Lugt. Finally, Johnson's pay and hours remained unchanged.

After transitioning to her new role Johnson consistently communicated with L.E. and van der Lugt seeking work assignments, but was rarely given work. Instead, van der Lugt would respond, "we will let you know if we have anything for you" and L.E. would tell Johnson, "I have it covered." Johnson similarly emailed HR manager and president and stated that she had nothing to work on. HR manager told Johnson to "raise a stink then, just like you did about the [performance improvement plan]. Maybe [van der Lugt] will take notice. All you can do is be a squeaky wheel now if you have no work." And president told Johnson that it was more appropriate for her to discuss her work assignments with van der Lugt. Between August and December 2017, Johnson worked on three design projects. She received two of the three jobs from L.E. and she received the third from a salesperson who asked Johnson to complete the job when L.E. was out of the office. In the

fourteen months before Johnson's job reassignment, she completed an average of 19.6 design projects per month.

In November 2017, Johnson filed a charge with the federal Equal Employment Opportunity Commission (the EEOC) and the Minnesota Department of Human Rights (the MDHR) alleging that SICO was discriminating against her because of her age. That same day, Johnson announced her retirement from SICO by email to van der Lugt. Johnson stated:

> The reason behind my retirement at this time is that I can no longer work under the intolerable conditions of the past several months and I see no steps being taken to make improvements. I cannot sit back in the corner being ignored and not given any design jobs or projects to work on.

Since Johnson's retirement, SICO has not hired a space designer to replace her because L.E. can handle all of SICO's space design needs.

The next month, acting on a pro se basis, Johnson served SICO with a handwritten complaint. After retaining counsel, Johnson served an amended complaint alleging age discrimination, reprisal, constructive discharge, and intentional infliction of emotional distress.[1] SICO moved for summary judgment and the district court granted SICO's motion.

This appeal followed.

[1] Johnson does not challenge the district court's dismissal of her intentional-infliction-of-emotional-distress claim on appeal.

DECISION

Johnson argues that the district court erred by granting summary judgment on her age-discrimination and reprisal claims. We review a district court's decision to grant summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, we examine whether the district court erred in its application of the law and whether there are any genuine issues of material fact. *Id.* We view the evidence in the light most favorable to the nonmoving party and do not reweigh facts or make credibility determinations. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 753-54 (Minn. 2005). Summary judgment must be denied when reasonable persons might draw different legal conclusions from the evidence presented. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020). But "we may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I. Johnson's age-discrimination claim

To survive summary judgment on an employment-discrimination claim under the Minnesota Human Rights Act (the MHRA), a plaintiff may show discriminatory intent by direct evidence or by using circumstantial evidence under the three-part burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Johnson claims that she showed SICO's discriminatory intent by both direct and circumstantial evidence.

A. *Direct evidence*

Direct evidence is evidence of conduct or statements by the employer's decision-makers that sufficiently reflect the alleged discriminatory attitude and permit the fact-finder to infer that the discriminatory attitude was more likely than not a motivating factor in the employer's adverse employment decision. *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999).[2] But "[n]ot all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference." *Id.* For example, stray remarks or statements by decision-makers unrelated to the decision-making process itself do not support the inference that the discriminatory attitude was a motivating factor in the adverse employment decision. *Id.*

Johnson argues that van der Lugt's statement that she wanted the "old [Johnson] back" is direct evidence of age discrimination. The district court found that Johnson failed to establish that van der Lugt's statement was a motivating factor for any adverse employment decision. We agree. Johnson testified that the comment was made during one of her discussions with van der Lugt, but that she does not remember when. There is no evidence that van der Lugt made an ageist statement in relation to any decision-making process. And the record shows that the "old" Johnson that van der Lugt wanted back was

[2] This court relies on federal caselaw interpreting anti-discrimination laws when the federal statute and the provision of the MHRA at issue are similar. *See Wenigar v. Johnson*, 712 N.W.2d 190, 205 (Minn. App. 2006) ("To help us determine if a cause of action exists under the MHRA, it is appropriate to call on the interpretations of the federal anti-discrimination statutes when the provisions of the federal statute and the MHRA are similar."); *see also Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010) ("In construing the MHRA, we apply law developed in federal cases arising under Title VII of the 1964 Civil Rights Act." (quotation omitted)).

the Johnson who used to try to bring new ideas and technology to the marketing department. Thus, van der Lugt's statement does not support the inference that any discriminatory attitude was a motivating factor in an adverse employment decision against Johnson. Viewing the evidence in the light most favorable to Johnson, we conclude that the record does not contain direct evidence of age discrimination sufficient to withstand summary judgment.

B. *Circumstantial evidence*

Johnson may also show discriminatory intent on behalf of SICO through circumstantial evidence under the *McDonnell Douglas* test. *Hoover*, 632 N.W.2d at 542. The *McDonnell Douglas* test has three steps: first, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995). Second, if the employee proves a prima facie case, the burden of production shifts to the employer to prove a nondiscriminatory reason for the adverse employment action. *Id.* And third, if the employer establishes a nondiscriminatory reason for the adverse employment action, the employee must prove that the employer's legitimate reasons for the adverse employment action were a pretext for discrimination. *Id.*

To establish a prima facie case for age discrimination, Minnesota courts generally require a plaintiff to show that: (1) she is a member of a protected class, (2) she had the qualifications for the position at issue, (3) she was discharged, and (4) she was replaced by a person outside the protected class. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995). But the requirements of the prima facie test for

employment discrimination may vary depending on the circumstances of the case. *McDonnell Douglas*, 411 U.S. at 802 n.13; *see also Friend v. Gopher Co.*, 771 N.W.2d 33, 37 (Minn. App. 2009) (stating that the purpose of a prima facie showing "is to disprove the most obvious legitimate bases for the employment decision"). To establish a prima facie case under the facts here, Johnson must show that (1) she is a member of a protected class, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) the circumstances give rise to an inference of discrimination. *Henry v. Indep. Sch. Dis. #625*, __N.W.2d__, __, 2021 WL 3136521, at *6 (Minn. July 26, 2021).

The parties do not dispute that the first and second elements in the prima facie test for age discrimination are met. Turning to the third element, the district court determined that Johnson failed to establish a prima facie case for age discrimination because she failed to show that she suffered an adverse employment action.[3] Johnson argues that she was subject to an adverse employment action because SICO constructively discharged her.

"A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination." *Pribil*, 533 N.W.2d at 412 (quotation omitted). To prove constructive discharge the employee must show (1) a

[3] In its order, the district court notes that Johnson "asks the Court not to treat constructive discharge as a separate claim, but rather to view it in the context of her age discrimination and reprisal claims." Based on its order, it is not clear whether the district court treated Johnson's constructive discharge claim as a separate claim. "[C]onstructive discharge is not an independent, free-standing cause of action. Rather, constructive discharge is a doctrine that may be invoked by a plaintiff in some employment-related actions to prove that, even though the plaintiff resigned from his or her job, the defendant should be deemed to have made an adverse employment action." *Coursolle v. EMC Ins. Group, Inc.*, 794 N.W.2d 652, 660 (Minn. App. 2011), *rev. denied* (Minn. Apr. 19, 2011). Thus, if the district court found that constructive discharge was a separate claim, it erred.

reasonable person in her situation would find the working conditions intolerable, and (2) the employer intended to force her to quit or retire. *Id.*; *see also Shea v. Hanna Min. Co.*, 397 N.W.2d 362, 368 (Minn. App. 1986) ("Constructive discharge may also occur when the employer has created a situation in which a reasonable person would feel compelled to resign or retire."). An employee can satisfy the second element through direct evidence that "her employer consciously meant to force her to quit" or by proving that the employer could reasonably foresee that its actions would lead to the employee's resignation. *Pribil*, 533 N.W.2d at 412. When determining whether a reasonable person would find the working conditions intolerable, we do not consider Johnson's subjective feelings. *Id.* Instead, the test is objective and turns "not on [Johnson's] actual reaction, but on the reaction of a reasonable employee in [her] position." *Id.* (quotation omitted).

The district court determined that having a "new desk location in the same building, with no reduction in her hours worked, are not such intolerable conditions that would give rise to a constructive discharge claim." The district court, however, glossed over the fact that SICO effectively exiled Johnson from the marketing department and took away virtually all of her design work. An "employer can render working conditions intolerable through inaction as well as action." *Sanders v. Lee Ctny. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012). Even so, the totality of Johnson's working conditions do not constitute intolerable conditions. Viewed from an objective standard, a reasonable employee whose desk was relocated, who was assigned a lower volume of work, and who was left out of gatherings, without a reduction in their hours or pay, would not find their working conditions intolerable. Because Johnson failed to show that her working conditions were

intolerable, she has failed to establish a prima facie claim for constructive discharge and has thus failed to show that she suffered an adverse employment action.

Viewing the evidence in the light most favorable to Johnson, we conclude that the record lacks circumstantial evidence of age discrimination sufficient to withstand summary judgment.

II. Johnson's reprisal claim

Johnson also argues that the district court erred by granting summary judgment on her reprisal claim. It is an unfair discriminatory practice to intentionally engage in reprisal against any person who opposed an employment practice forbidden by the MHRA. Minn. Stat. § 363A.15 (2018). "A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment." *Id.* A reprisal claim is analyzed under the three-part *McDonnell Douglas* burden-shifting test. *Hoover*, 632 N.W.2d at 547. To satisfy the first part of the test, an employee must show a prima facie claim for reprisal. *Dietrich*, 536 N.W.2d at 323. A prima facie case for reprisal consists of three elements: "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hoover*, 632 N.W.2d at 548 (quotation omitted).

Here, because Johnson has failed to establish an adverse employment action by SICO, the second element of a prima facie claim for reprisal is not satisfied and her reprisal claim fails as a matter of law. Viewing the evidence in the light most favorable to Johnson, we conclude that the record lacks evidence of reprisal sufficient to withstand summary judgment.

Johnson also argues that the district court erred by determining that her age-discrimination claim was time-barred. But we may affirm a grant of summary judgment if it can be sustained on any grounds. *Doe 76C*, 817 N.W.2d at 163. Because the record lacks evidence of age discrimination or reprisal sufficient to withstand summary judgment, we affirm the district court's grant of summary judgment on the merits and need not reach Johnson's statute-of-limitations argument.

Affirmed.