STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0905

Lisa Larkins,
Appellant,

vs.

State of Minnesota, Department of Revenue,
Respondent.

Filed March 7, 2022
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CV-19-8985

Darron C. Knutson, New Brighton, Minnesota (for appellant)

Keith Ellison, Attorney General, Leah M. Tabbert, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Lisa Larkins sued her employer, the Minnesota Department of Revenue, alleging it violated the Minnesota Human Rights Act and the Minnesota Whistleblower Act in a series of adverse employment actions taken against her between 2012 and 2018. The district court ordered summary judgment dismissing Larkins's complaint. Because the statute of

limitations bars claims based on the earlier events and no genuine dispute of material fact prevents judgment favoring the department on the claims based on later events, we affirm.

FACTS

This appeal arises from the district court's summary-judgment decision favoring the Minnesota Department of Revenue, dismissing discrimination and retaliation claims brought by department employee, Lisa Larkins. These facts are therefore based on the evidence that is either undisputed or construed in Larkins's favor.

The department hired Larkins in October 2001, and for the period relevant to this dispute she worked as a senior revenue tax specialist in the sales and use division. Senior revenue tax specialists conduct sales-tax and use-tax onsite audits of large businesses. Larkins's supervisors did not review her performance negatively until 2011, when her supervisor indicated that she had not been consistently arriving to work on time and had used her paid sick leave excessively.

Larkins's 2012 performance review cited additional issues. Supervisor Rebecca Davis told Larkins that she needed to be more respectful and professional, and she documented that Larkins referred to her coworkers and clients as "Miss" and "Mister," presumably discourteously, and stated that others perceived her as rude and standoffish. Another supervisor asked Larkins if she behaved that way because she is black. Larkins objected and appealed the performance review, and the department amended it to remove references unrelated to this appeal.

The department continued to express concerns about Larkins's need for promptness. Two weeks after the review, Davis gave Larkins a "Letter of Expectation" aimed at

correcting her behavior. Larkins responded by lodging an intradepartmental complaint alleging that the letter was discriminatory, singling her out because of her race. The day after Larkins complained, her supervisor suspended her for one day because she continued to arrive late, did not go to the office before traveling to audit locations, and did not adequately communicate with Davis. Larkins filed a complaint with the Equal Employment Opportunity Commission (EEOC), asserting that the department had retaliated against her because she complained about the corrective letter. Larkins also filed a grievance under the collective-bargaining agreement between her union and the department.

Larkins left work on a year-long medical leave of absence, and she and the department settled the grievance shortly before she returned. On her return, the department assigned her to a different supervisor, Wendy Rozinka. Rozinka did not speak to Davis or to Larkins's previous supervisors, and she was unaware of Larkins's discrimination claims and the grievance. Rozinka gave Larkins training assignments to complete, requiring her to work with another auditor for her first few audits on returning from leave and directing her to write a detailed plan for any audit she was assigned. Rozinka observed that Larkins was often tardy and frequently used paid vacation time on short notice. She coached Larkins to correct these issues.

Jim Manson succeeded Rozinka as Larkins's supervisor after Rozinka was promoted in July 2015. In early 2016, Larkins asked permission to work from home. Manson preliminarily approved the request, but the department denied it after Rozinka expressed doubts about whether Larkins could be trusted to work without supervision in light of her issues with tardiness, use of paid leave time, and unsatisfactory work

performance. Larkins believed that Manson began to manage her more intensely after her request. Manson noticed that Larkins arrived at least 30 minutes late several times in the next months, pulling a "turnstile" report of when she entered and exited the building. The report showed that Larkins often arrived late and "there were full days when [she] was not in the office and not at an audit site." Manson talked with Larkins about her behavior and noted it in her performance review.

Larkins took another unpaid medical leave from August 2016 to October 2017. During this leave, she was diagnosed with two medical conditions that cause internal bleeding and pain that sometimes inhibits her from getting out of bed. They can also cause fatigue, nausea, dizziness, and headaches. Larkins underwent surgery to mitigate her symptoms, which she anticipated being able to manage with medication and physical therapy.

Before returning to work in October 2017, Larkins asked the department to accommodate her by allowing her to work only four hours daily, pairing her with a coworker when she performed audits, and providing her an ergonomic chair and desk. The department agreed to equip Larkins with an ergonomic chair and desk and to allow Larkins to work part-time, but not as an auditor. The department reasoned that onsite auditing required eight-hour workdays. The department allowed Larkins to retain her job classification and wage rate.

Larkins requested another accommodation four months later, seeking a "variable start time." The department denied this request but offered an alternative—it would allow her to begin her workday at 9:00 a.m. instead of 8:00 a.m. Larkins rejected the offer.

Before Larkins eventually returned to full-time auditing in August 2018, during her part-time assignment she continued to have issues with tardiness and use of paid leave. She received a "Letter of Expectation" from Manson in July 2018, instructing her to make vacation leave requests at least 24 hours in advance, to adhere to her work schedule, and to inform him if she could not meet her schedule. And in August 2018, the department reprimanded Larkins for failing to adhere to the expectations outlined in the July letter. Larkins continued to be occasionally tardy after she returned to full-time work. This included twice being late to client meetings in September. A turnstile report showed that she was late on 13 out of 18 workdays beginning August 15. The department again suspended Larkins for one day.

Shortly before the suspension, Larkins had a verbal altercation with a fellow auditor. The two offered different interpretations of the incident. Larkins felt that the coworker had behaved inappropriately toward a client, and the following day she confronted the coworker and asked her to apologize to the client. The coworker did not feel she needed to apologize and asked Larkins to leave her cubicle. The coworker and Larkins sent emails to their interim supervisor, each claiming the other was at fault. The department disciplined neither employee, and it sent Larkins a "Letter of Expectation" reminding her to act professionally in the workplace.

In November 2018, Larkins made a third request for accommodations, including, among other things, allowing her to work remotely. The department granted all but her request to work from home. According to Larkins, between January 2019 and December 2020, she spoke with Manson, who told her that management had a grudge against Larkins

because she filed a complaint with the EEOC after her 2012 performance review. He allegedly apologized. Manson denies this conversation happened, but we assume it did for the purpose of this summary-judgment appeal.

Larkins sued the department on October 10, 2019, exactly one year after her second one-day suspension. She raised four claims, alleging that the department discriminated against her based on her disability, discriminated against her based on her race, retaliated against her because she complained about the discrimination, and violated the Minnesota Whistleblower Act when it reminded her to act professionally in the workplace after the altercation with her fellow auditor. After discovery, the department moved for summary judgment, which the district court granted.

Larkins appeals.

DECISION

Larkins challenges the summary-judgment decision. We review a district court's summary-judgment decision de novo, determining whether the district court properly applied the law and whether there are genuine issues of material fact precluding judgment as a matter of law. Minn. R. Civ. P. 56.01; *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We accomplish this by considering only the evidence of undisputed facts and by viewing any disputed facts in the light most favorable to the nonmoving party. *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). Based on our de novo review, we are satisfied that summary judgment properly disposes of all claims either on untimeliness grounds or on the merits, for the following reasons.

I

We first address whether the statute of limitations applies here, responding to Larkins's contention that the continuing nature of the alleged violations precludes barring her claims for untimeliness. To bring a claim of employment discrimination under the Minnesota Human Rights Act (MHRA), a complainant must file her claim "within one year after the occurrence of the practice." Minn. Stat. § 363A.28, subd. 3(a) (2020). Unlawful conduct might be an easily identifiable, discrete act by the employer, and the triggering event beginning the clock on the statute of limitations can be determined from that event. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). But sometimes the allegations instead involve "a sufficiently integrated pattern to form, in effect, a single discriminatory act" that spans over time, and the clock does not run in that circumstance until the final act under the continuing-violations doctrine. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 440–41 n.11 (Minn. 1983). A third category does not involve either one discrete event or a series of events forming an integrated pattern, but rather involves a series of related but discrete acts where each act is easily identifiable and constitutes a "separate actionable unlawful employment practice." *Morgan*, 536 U.S. at 114 (quotation omitted); *see Hubbard*, 330 N.W.2d at 441–44 (applying federal employment-law reasoning to claims under the MHRA). The claims here fall into that third category.

We reject the notion that the continuing-violations doctrine applies here. The actions complained of were not allegedly orchestrated by a single decision-maker or supervisors who were operating in concert with each other (or even aware of prior concerns or

decisions). Larkins identifies as violations three discrete events, unrelated to each other, that fall outside the one-year limitations period: the racially tainted comments her supervisor made in 2012, the one-day suspension in 2013, and the partial denial of her request for accommodations in 2017. These are distinct actions independent of the allegedly violative conduct that occurred within the limitations period. Each is readily identifiable as a separate act and each was actionable when it occurred. We hold the statute of limitations bars Larkins's claims based on events before October 10, 2018.

II

Larkins next argues that the facts construed in her favor establish that the department discriminated against her based on her disability, focusing on her one-day suspension in 2018. The MHRA prohibits adverse employment action because of disability, meaning that the action resulted from discriminatory intent. Minn. Stat. § 363A.08, subd. 2 (2020); *Hoover v. Norwest Priv. Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Larkins provided no proof of discriminatory intent either by direct or circumstantial evidence. The undisputed evidence establishes that the supervisor who issued the 2018 suspension was unaware Larkins had any disability. This resolves her disability-discrimination claim.

We are not persuaded otherwise by Larkins's reliance on the department's 2017 choice not to grant all of Larkins's accommodation requests. She reasons that her 2018 suspension for tardiness and failing to give notice before taking unpaid leave resulted from the department's denying her 2017 accommodation request. We need not address the department's legal challenge to this theory because we conclude that the facts could not support it in any event. The only accommodations request relevant to Larkins's tardiness

and her failure to follow the department's leave policy was her request to vary her start time. According to the evidence Larkins presented, her disability caused her to occasionally need up to an additional 30 minutes to prepare for work. The department's offer to afford her a full additional hour by moving her start time back an hour would have remedied her disability-related tardiness and was a reasonable accommodation rejected by Larkins. Also independently fatal to Larkins's argument, she was suspended for being late to two audits with taxpayers—midday tardiness that would have been unaffected by her requested variable start-time accommodation. The district court correctly ordered summary judgment on the disability-discrimination claim.

III

Larkins also failed to present evidence to create a triable issue of fact on her claim of race-based discrimination. The MHRA prohibits an employer from taking adverse employment action against an employee because of her race. Minn. Stat. § 363A.08, subd. 2. Larkins did not provide either direct or circumstantial evidence that the department discriminated against her because of her race.

Larkins failed to provide direct evidence of race discrimination. Direct-discrimination evidence is evidence that shows "a specific link between the alleged discriminatory animus and the challenged decision." *Hutton v. Maynard*, 812 F.3d 679, 683 (8th Cir. 2016). Larkins points to the comments made by Davis during her 2012 performance review. This event occurred long before the limitations period lapsed, so it cannot form a basis of Larkins's claim by itself. And it also does not relate indirectly to the 2018 suspension within the statutory period because Davis no longer supervised Larkins

or had anything to do with departmental action related to Larkins after her 2014 medical leave ended and she returned to work. Larkins fails to connect the 2012 performance review or comments made at that time to the 2018 decisions.

Larkins also failed to provide indirect, circumstantial evidence of race discrimination. To overcome summary judgment based on indirect evidence, the complaining employee must first point to evidence making a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a prima facie case, a plaintiff must show that: "(1) she is a member of a protected group; (2) she was meeting the legitimate expectations of her employer; (3) she suffered an adverse employment action; and (4) similarly situated employees who are not members of the protected group were treated differently." *Box v. Principi*, 442 F.3d 692, 696 (8th Cir. 2006). If the complainant makes that initial burden, the burden then shifts back to the employer to provide a nondiscriminatory reason for its decision, followed by further burden shifting if it does so. *McDonnell Douglas*, 411 U.S. at 802. We need not discuss the later steps of burden shifting because Larkins failed to show that similarly situated employees who are not black were treated differently from her. Despite the opportunity to find supporting evidence through discovery, Larkins neither identified any employee who was granted the working terms that she was denied nor did she offer any evidence countering the department's evidence that it had obtained turnstile reports when investigating the conduct of other employees. Because Larkins provided insufficient circumstantial evidence that she was the victim of race discrimination, she fails to establish a prima facie case to avoid summary judgment.

IV

Larkins points to two instances of supposed direct evidence that the department retaliated against her because she reported incidents of discrimination. But neither makes the case. Unlawful retaliation can be proved by direct evidence. The standard for what constitutes direct evidence is the same: it must show "a specific link between the alleged discriminatory [or retaliatory] animus and the challenged decision." *Bernard v. St. Jude Med. S.C., Inc.*, 398 F. Supp. 3d 439, 459 (D. Minn. 2019) (quoting *Hutton*, 812 F.3d at 683). Larkins again emphasizes the improper statements surrounding her 2012 performance review, but the incident fails to support her retaliation claim for the same reasons it fails to support her discrimination claim, discussed above. Larkins also emphasizes her conversation with Manson in 2019. She asserts (and we accept for the purposes of summary judgment) that Manson told her that he had "discovered" that management at the department held a grudge against her because of the complaint she filed with the EEOC in 2013 and that supervisors denied privileges to Larkins because of their grudge. The vague assertion that her managers held a grudge against her and denied her privileges is not direct evidence that her 2018 suspension was the result of a grudge that began in 2013. The only direct evidence of the cause of the suspension is unrefuted evidence that Larkins was, after multiple warnings about her tardiness, late for two client meetings in September and arrived to work late 13 out of only 18 workdays. The double hearsay offered by Larkins does not constitute evidence from which a reasonable factfinder could conclude that the suspension resulted from retaliation. That claim too fails on the merits.

V

Larkins's claim under the Minnesota Whistleblower Act fails as a matter of law for lack of evidence of a triggering report. Larkins argues that the department issued the 2018 one-day suspension because she, acting in good faith, reported a violation of the department's Respectful Workplace Policy. Under the Minnesota Whistleblower Act, employers shall not take specific adverse action against an employee "because the employee . . . , in good faith, reports a violation . . . of any federal or state law or common law or rule adopted pursuant to law to an employer." Minn. Stat. § 181.932, subd. 1(1) (2020). A report is "a verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law." Minn. Stat. § 181.931, subd. 6 (2020). A report that someone merely behaved problematically or reprehensibly without violating the law is not covered by the Minnesota Whistleblower Act. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 22 (Minn. 2009). And the vital element of whistleblowing under Minnesota law is "the protection of the general public or, at least, some third person or persons." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000). *Cf. Ring v. Sears, Roebuck and Co.*, 250 F. Supp. 2d 1130, 1135 (D. Minn. 2003). Under this standard, Larkins has not identified any report under the act.

Larkins argues that the Respectful Workplace Policy is a "rule adopted pursuant to law" because the Minnesota Department of Management and Budget adopted the rule under Minnesota Statutes section 43A.04, subdivision 4 (2020). We reject the attenuated attempt to convert an ordinary workplace policy into a rule adopted by law. That the department's workplace-respect policy resulted from rulemaking power of the

commissioner of the department of management and budget is irrelevant. In substance it is an internal policy affecting employees, not a rule with any application to benefit the general public. The legislature's use of the defining terms "statute, regulation, or common law" informs us of the type of rule the statute refers to, indicating that it regards the rulemaking available to administrative agencies through the Administrative Procedure Act rather than the rulemaking authority provided in section 43A.04, subdivision 4, which is specifically outside the bounds of the Administrative Procedure Act. We therefore affirm the district court's order granting summary judgment to the department on the Minnesota Whistleblower Act claim.

Affirmed.