

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0278**

Tama May Boe Kerber,
Appellant,

vs.

Recover Health of Minnesota, Inc., et al.,
Respondents.

**Filed September 6, 2022
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-20-14520

Tama May Boe Kerber, Chanhassen, Minnesota (pro se appellant)

Jessica L. Roe, Alex L. Rubenstein, Nicholas M. Beckman, Roe Law Group, PLLC,
Minneapolis, Minnesota (for respondents)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

A self-represented appellant challenges a district court order (1) dismissing her employment discrimination and reprisal claims by granting respondent's motion for summary judgment and (2) denying her motion to amend her complaint to add a defamation claim. We affirm.

FACTS¹

Respondent Recover Health of Minnesota, Inc., hired appellant Tama May Boe Kerber as a community liaison on June 16, 2017. Kerber's duties included developing prospective senior-living-facility clients and managing existing client relationships that Recover Health assigned to her.

About mid-September 2017, Kerber's supervisor at Recover Health asked to ride with Kerber to a client site. Kerber refused, and on September 16, she emailed the supervisor that "[she has] a little anxiety driving with other [adults] in [her] car" and has "had to deal with [this anxiety for] a long time." Five days later, the supervisor took over managing Kerber's existing client accounts and scheduled a performance review for Kerber for September 22. Kerber did not attend the scheduled performance review. The supervisor rescheduled the review for September 27. Kerber again did not attend.

Around this time, Kerber spoke with Recover Health's director of human resources, its chief operating officer, and its sales director about the supervisor's decision to remove certain accounts from Kerber's job duties. Later, Kerber requested permission to attend weekly group-therapy meetings for her anxiety and depression and met with the human-resources director on October 11 to discuss her request. Around October 16, Recover Health offered Kerber paid time off to consider her employment and whether she could move past the supervisor's decision to manage certain accounts. Kerber took some paid

¹ The facts presented are either based on undisputed evidence or disputed evidence construed in the light most favorable to appellant, the party against whom summary judgment was granted. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

time off and eventually asked to work part-time. Recover Health's human-services director and branch manager met with Kerber on October 24. Following their discussion, Recover Health terminated Kerber's employment.

Kerber filed a complaint against Recover Health alleging discrimination and reprisal violations under the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01 to .44 (2020). Four months later, Kerber filed a motion to amend her complaint, for the second time, to add a defamation claim against Recover Health. The district court denied Kerber's motion to amend.

Recover Health filed a motion for summary judgment. Following a hearing, the district court granted Recover Health's motion, dismissing Kerber's discrimination and reprisal claims. This appeal follows.

DECISION

Kerber argues that the district court erred by granting summary judgment dismissing her disability discrimination and reprisal claims by (1) considering issues not raised by Recover Health and (2) determining that no genuine issue of material fact exists as to her discrimination and reprisal claims. Kerber also argues that the district court erred by (3) denying her motion to amend to add a defamation claim by determining that her proposed defamation claim is statutorily time-barred and (3) not applying the discovery rule to determine when her claim accrued.

I. The district court did not err by granting Recover Health’s summary-judgment motion on Kerber’s discrimination and reprisal claims.

A. Standard of review

We review summary-judgment decisions de novo. *See City of Waconia v. Dock*, 961 N.W.2d 220, 229 (Minn. 2021). To survive a summary-judgment motion, the nonmoving party must present specific, admissible evidence that shows a genuine issue of material fact. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). “A genuine issue of material fact exists when there is sufficient evidence regarding an essential element to permit reasonable persons to draw different conclusions.” *St. Paul Park Refin. Co. v. Domeier*, 950 N.W.2d 547, 549 (Minn. 2020) (quotation omitted). We view the evidence in the light most favorable to the nonmoving party. *Id.* We may affirm a grant of summary judgment on any ground. *Doe*, 817 N.W.2d at 163.

B. The district court did not err by dismissing Kerber’s discrimination claim on summary judgment.

Kerber argues that the district court erred by dismissing her disability-discrimination claim against Recover Health. We are not persuaded.

To prevail on an employment-discrimination claim under the MHRA, a plaintiff must show (1) the plaintiff has a “disability” as defined by the MHRA and (2) employment discrimination under the MHRA based on the disability. Minn. Stat. §§ 363A.03, subd. 12, .08, subd. 2. Discriminatory intent can be shown either by “direct evidence” of discrimination or by evidence that satisfies the three-part framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hoover v. Norwest Priv. Mortg. Banking*,

632 N.W.2d 534, 542 (Minn. 2001). The parties agree, as do we, that consideration of the *McDonnell Douglas* framework is proper here.

To meet the first part of the *McDonnell Douglas* framework, a plaintiff must establish a prima-facie case of discrimination. *Id.* A prima-facie case requires a showing that (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a job; (3) despite the plaintiff's qualification, the employer dismissed the plaintiff; and (4) after the plaintiff's dismissal, the position remained available or the employer gave it to someone else with the plaintiff's qualifications. *Sigurdson v. Carl Bolander & Sons Co.*, 532 N.W.2d 225, 228 (Minn. 1995). Once a prima-facie case is established, the burden shifts to the employer to offer a legitimate and nondiscriminatory reason for the adverse employment action. *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 918 (Minn. 2012). If the employer offers a reason, the burden shifts back to the plaintiff to provide sufficient evidence showing that the employer proffered a pretextual explanation. *Id.*

Kerber appears to argue that the district court erred by determining that she did not present specific evidence of her disability because it erroneously "conflated a pleading . . . with an affidavit or any other evidence offered by [her]" and genuine issues of material fact exist.

The record shows that the district court did not conflate a "pleading" with an "affidavit." Instead, it correctly determined that Kerber relied "on her own *affidavit*." (Emphasis added.) Kerber's affidavit contained her own statements, which do not create a genuine issue of material fact. Her affidavit also contained a single exhibit related to treatment of her alleged disability. But the exhibit, a note from Park Nicollet, only shows

that Kerber saw her doctor on October 2, 2017, and that the doctor increased her dosage of Prozac, neither of which is specific evidence of Kerber's alleged disability, as required by a nonmoving party to defeat summary judgment. *See Gonzales v. Hollins*, 386 N.W.2d 842, 845 (Minn. App. 1986) (stating that non-moving party must establish material-fact issues).

Kerber alternatively argues that the district court should not have determined the disability issue in the first instance because Recover Health did not contest Kerber's disability under the MHRA in its motion for summary judgment and she therefore did not have proper notice. She also contends that Recover Health conceded the issue in her favor by not raising it below. But Kerber, as the petitioner, had the burden to show that she had a disability under the MHRA to prove her discrimination claim. And indeed, Kerber had addressed that issue in her memorandum opposing summary judgment. Further, the record shows that Recover Health reserved the disability issue below. We conclude the district court did not err by determining that Kerber failed to present specific evidence of her disability and granting summary judgment to Recover Health on her discrimination claim against Recover Health.

C. The district court did not err by dismissing Kerber's reprisal claim on summary judgment.

Kerber argues that summary judgment on her reprisal claim was improper because the removal of six of her accounts and her termination constitute adverse employment actions and temporal proximity between her protected conduct and Recover Health's adverse actions establish discrimination. We disagree.

It is an “unfair discriminatory practice” to engage intentionally “in any reprisal against any person because that person . . . opposed a practice forbidden under [the MHRA].” Minn. Stat. § 363A.15 (2020). “A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment.” *Id.* A plaintiff may prove a reprisal claim by direct evidence or by “using circumstantial evidence in accordance with the three-part [McDonnell Douglas] burden-shifting test.” *Hoover*, 632 N.W.2d at 542; *see also Friend v. Gopher Co.*, 771 N.W.2d 33, 37-40 (Minn. App. 2009) (explaining direct method of proof). A plaintiff proceeding under the *McDonnell Douglas* framework bears the initial burden of establishing a prima-facie case of reprisal. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

To prove a prima-facie case of reprisal, “an employee must establish: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). Here, the district court determined that Kerber proved that her conduct is statutorily protected. As a result, only the second and third elements are at issue.

Kerber contends that she established causation because “temporal proximity *alone* may give rise to an inference of discrimination.” Although timing alone can establish causation, “[t]he mere *coincidence* of timing . . . is rarely sufficient.” *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 866 (8th Cir. 2006) (emphasis added). Cases in which courts have determined that temporal proximity alone supported an inference of a causal link have held that the temporal proximity must be very close. *Id.* Even assuming, without deciding, that the supervisor’s decision to manage Kerber’s accounts constitutes an adverse employment

action, the record shows that the act occurred five days after Kerber's statutorily protected conduct. Kerber presents no further evidence of a causal link between the two events. The district court therefore did not err by granting summary judgment to Recover Health on Kerber's reprisal claim. Because our conclusion is dispositive, we need not address appellant's other arguments.

II. The district court did not err by determining that the statute of limitations would bar her proposed defamation claim and not applying the discovery rule.

Kerber argues that the district court erred by denying her motion to amend her complaint to add a defamation claim against Recover Health. We disagree.

In Minnesota, a plaintiff must bring a defamation action within two years after the defamatory conduct. Minn. Stat. § 541.07(1) (2020).

Here, Kerber sought to amend her complaint, for the third time, on March 13, 2021, based on alleged defamatory statements made in an October 3, 2017 email exchange. Thus, more than two years passed from the alleged unlawful conduct and the time Kerber filed the complaint. The district court did not err by denying her motion to amend to add a defamation claim because it is statutorily time-barred.

Kerber contends that the district court should have applied the discovery rule in determining whether her proposed defamation claim would be statutorily time-barred, arguing that other states have adopted that rule. The "discovery rule" tolls the statute of limitations until the plaintiff discovers the facts giving rise to a cause of action; it has been narrowly applied in Minnesota to medical malpractice cases in which "a physician prevents a patient from discovering a cause of action against the physician by fraudulent

concealment.” *Johnson v. Winthrop Lab ’ys Div. of Sterling Drug, Inc.*, 190 N.W.2d 77, 81 (Minn. 1971). However, the Minnesota Supreme Court has declined to adopt it as a general rule in the absence of fraud. *See id.*; *see also Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006) (stating that “We have . . . rejected the discovery rule.”). Kerber asks us to create new law. That is not a function of this court. “The function of the court of appeals is limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *see Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015) (quoting this aspect of *Sefkow*). We decline Kerber’s request.

Affirmed.