STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1897

Judith Zaitz,
Appellant,

vs.

Minneapolis Downtown Council, et al.,
Respondents.

Filed July 5, 2011
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-09-20042

Stephen W. Cooper, Stacey R. Everson, The Cooper Law Firm, Chartered, Minneapolis, Minnesota (for appellant)

Charles F. Knapp, Jennifer J. Kruckeberg, Faegre & Benson LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

In this action alleging employment discrimination, appellant Judith Zaitz challenges the district court's grant of summary judgment in favor of respondents Minneapolis Downtown Council (MDC) and Sam W. Grabarski on her claims of age

discrimination, religious discrimination, sexual harassment, reprisal, assault, and battery. Concluding that Zaitz had failed to present any evidence of discrimination and had failed to establish prima facie cases for any of her claims, the district court dismissed the matter. We affirm.

D E C I S I O N

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 its application of the law. *Star Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment is appropriate if an employee fails to present a prima facie case of employment discrimination under the Minnesota Human Rights Act (MHRA). *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 481-82 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). In construing the MHRA, we apply both 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).

I.

Zaitz argues that the district court erred by dismissing her age-discrimination claim. We disagree.

Under the MHRA, an employer may not discharge an employee because of age. Minn. Stat. § 363A.08, subd. 2 (2010). To establish age discrimination, a plaintiff may either prove a claim directly or under the *McDonnell Douglas* burden-shifting test.

Hoover v. Norwest Private Mortg. Banking, 632 N.W.2d 534, 542 (Minn. 2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973)). We address each of these methods in turn.

Direct method

Under this evidentiary framework, the plaintiff relies on affirmative evidence that the employment decision was motivated by discrimination. *Friend v. Gopher Co.*, 771 N.W.2d 33, 37-38 (Minn. App. 2009). A plaintiff may prove a claim under this method "through either direct or circumstantial evidence, or a combination of the two." *Id.* at 40.

MDC employed Zaitz as the administrative assistant to Grabarski, MDC's president and chief executive officer. Zaitz's employment was terminated in January 2005, when she was 64 years old. Zaitz argues that there is affirmative evidence that she was terminated because of her age. Specifically, Zaitz relies on (1) an e-mail message written by Grabarski, in which he states that Zaitz's termination might expose MDC to an age-discrimination lawsuit; and (2) e-mail messages to Grabarski from a member of the MDC board that express concern about a possible lawsuit.

This evidence is insufficient to establish a genuine issue of material fact as to whether Zaitz was terminated because of her age. *See Courtney v. Biosound, Inc.*, 42 F.3d 414, 420 (7th Cir. 1994) (stating that "no inference of guilt can be drawn from a company's sensitivity to its potential liability under the age discrimination law when discharging a protected older worker, unless the innocuous evidence of age awareness is made significant by other evidence that would give rise to such an inference" (quotation omitted)).

McDonnell Douglas

The *McDonnell Douglas* evidentiary framework "requires a plaintiff to establish a prima facie case of discrimination and prove that an employer's proffered reason for a challenged employment decision is a pretext for discrimination." *Friend*, 771 N.W.2d at 37. "Although the prima facie case varies depending on the type of employment decision that is challenged, its purpose is to disprove the most obvious legitimate bases for the employment decision, thereby allowing the inference that the decision was motivated by discrimination." *Id.* If a plaintiff establishes a prima facie case, the burden then shifts to the employer to show legitimate, nondiscriminatory reasons for its actions. *Fletcher*, 589 N.W.2d at 102. If the employer meets this burden, the burden shifts back to the employee to demonstrate that the employer's reasons for the decision were actually a pretext for discrimination. *Id.*

A discharged employee carries the initial burden of establishing a prima facie case by showing that (1) she is a member of a protected class; (2) she was qualified for the job from which she was discharged; (3) she was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 442 (Minn. 1983). In a reduction-in-force (RIF) case—that is, where the plaintiff's duties are either eliminated or redistributed to remaining workers—the fourth element is satisfied by showing that age was a factor in the termination. *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1153 (8th Cir. 2007); *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995).

Here, Zaitz's position was eliminated and her duties were subsumed by another MDC employee, who is younger than Zaitz. But this is not sufficient evidence to establish that age was a factor in her termination. *See Stidham v. Minn. Mining & Mfg., Inc.*, 399 F.3d 935, 939 (8th Cir. 2005) (holding that evidence that younger employees assumed important aspects of demoted employee's position did not raise an inference of age discrimination because, in RIF cases, "it must be expected that some duties will be taken on by other employees"). And Zaitz has failed to present any other evidence that age was a factor in her termination.

Because Zaitz has failed to establish a prima facie case of age discrimination, the district court did not err by dismissing this claim under the *McDonnell Douglas* framework and Zaitz's age-discrimination claim fails to survive summary judgment.

II.

Zaitz also argues that the district court erred by dismissing her religious-discrimination claim. Zaitz contends that respondents discharged her because of her religion, in violation of the MHRA. *See* Minn. Stat. § 363A.08, subd. 2 (stating that an employer may not discharge an employee because of religion). We disagree.

Direct method

On the afternoon of January 27, 2005, following the conclusion of MDC's annual meeting, Zaitz, Grabarski, and several coworkers went to a restaurant and bar. Grabarski had "two to four" drinks; Zaitz did not drink alcohol. Grabarski made comments to Zaitz that she alleges were inappropriate and supportive of her religious-discrimination claim. Before Zaitz left the restaurant, she and Grabarski argued over whether Zaitz should tip

the restroom attendant. When Zaitz refused Grabarski's attempts to give her $5 to pay the attendant, Grabarski pointed his finger at Zaitz, yelling, "F--- you, f--- you, f--- you." He added: "God doesn't like you now and I don't like you either. Those people come over here to earn a living." Later that evening, Grabarski sent an e-mail to various MDC board members and employees, in which he stated that Zaitz's employment would be terminated immediately. Grabarski and MDC chairperson Deborah Hopp presented Zaitz with a termination letter on January 31, 2005.

Zaitz argues that there is affirmative evidence that she was terminated because of her religion. Specifically, Zaitz relies on: (1) Grabarski's statement in the January 27, 2005 e-mail message that she "imposes her personal religious, economic or social beliefs on other staff members"; (2) Grabarski's statement in a January 28, 2005 e-mail message that he "bl[ew] up at her yesterday [at the restaurant] . . . when I could not accept hearing her views about race, creed, and morality any longer"; and (3) Grabarski's statement to her at the restaurant that "God doesn't like you now and I don't like you either."

But even taking the e-mail messages in the light most favorable to Zaitz's claim, the messages indicate that Grabarski was angry with Zaitz not because she held certain religious beliefs, but because he perceived that she "impose[d]" these beliefs on other MDC employees. And as the district court properly determined, such evidence does not establish a discriminatory animus. *See Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012, 1018 (4th Cir. 1996) (holding that employer presented "legitimate and non-discriminatory" reasons for discharging employee, including that employee had sent letters with religious content to her coworkers).

Zaitz argues that Grabarski decided to terminate her employment hours after he stated that "God doesn't like [Zaitz]," as evidenced by the e-mail message Grabarski sent on the evening of January 27, 2005. But, as the district court properly concluded, the e-mail message, considered in its entirety, as well as other evidence in the record, indicates that the decision to eliminate Zaitz's position was made before January 27, 2005.

We conclude that the direct evidence submitted by Zaitz is not sufficient to establish a genuine issue of material fact as to whether religious animus actually motivated the termination of Zaitz's employment. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (stating that direct method requires "evidence showing 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" (quotation omitted)).

McDonnell Douglas

Zaitz asserts on appeal that respondents conceded that she established a prima facie case of religious discrimination. But even assuming that Zaitz established a prima facie case of termination based on religious animus, Zaitz's claim fails under the *McDonnell Douglas* evidentiary framework. Respondents have articulated a nondiscriminatory reason for her termination: the restructuring plan eliminating her position and creating the position of Special Projects Assistant that was referred to in the January 27 e-mail. And Zaitz has not presented any evidence to demonstrate that respondents' reasons were actually a pretext for religious discrimination. *See Fletcher*, 589 N.W.2d at 102 (describing burden-shifting under *McDonnell Douglas*).

We conclude Zaitz's religious-discrimination claim fails to survive summary judgment under either evidentiary framework.

Accommodation

Zaitz also alleges that respondents failed to accommodate her religious beliefs. This claim fails because Zaitz has not specified how she informed respondents concerning her beliefs, what accommodation was required, or how respondents failed to accommodate her religious beliefs. *See Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2001) (stating that a failure-to-accommodate claim requires demonstration that plaintiff had a religious belief that conflicted with an employment requirement; informed his employer of his particular religious belief; suffered an adverse employment action because he did not comply with the requirement; and employer was unwilling to reasonably accommodate that belief).

III.

Zaitz argues that the district court erred by dismissing her claim that Grabarski terminated her employment because she rejected his unwelcome sexual advances. We disagree.

The MHRA declares that sexual harassment is a form of prohibited discrimination. Minn. Stat. § 363A.03, subd. 13 (2010). Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when," among other things, "submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment." *Id.*, subd. 43 (2010).

To establish a prima facie case of sexual harassment under Minn. Stat. § 363A.03, subd. 43(2), a plaintiff is required to show that

> (1) she is a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment.

Benassi, 629 N.W.2d. at 480-81.

The first element is satisfied because Zaitz is a woman. *See Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996).

As to the second element, Zaitz has presented evidence that Grabarski made the following sexual advances to her: (1) kissing her in his office in September 2003; (2) stating that he would like to go home with her at a 2004 social gathering of MDC employees; and (3) making an allegedly suggestive comment to her at the restaurant on January 27, 2005. Zaitz has also presented evidence that she indicated that the alleged sexual advances were unwelcome—for example, after the September 2003 kiss, Zaitz told Grabarski that she "was not interested in such behavior and it should not happen again." *See id.* at 1378 (stating that inquiry should focus on whether plaintiff indicated alleged harassment was unwelcome).

The third element is satisfied because "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." *See Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992), *abrogated on other grounds by Miller v. Woodharbor Molding & Millworks, Inc*, 174 F.3d 948 (8th Cir. 1999) (per curiam).

But the fourth element is not supported because there is no evidence to connect Grabarski's isolated alleged improper conduct with any evidence that Zaitz would suffer detrimental employment consequences if she did not submit to the alleged advances. There is no evidence that Grabarski made either an explicit or implicit threat to terminate Zaitz's employment for rejecting these alleged advances. To the contrary, at her deposition, Zaitz testified that her termination was unexpected; she did not testify that she was under the impression that refusing Grabarski's advances in any way affected her employment. Thus, Zaitz's sexual harassment claim fails. *See Newton v. Cadwell Labs.*, 156 F.3d 880, 883 (8th Cir. 1998) (agreeing with district court that "there is no evidence that job benefits were associated with [plaintiff's] submission to [defendant's] advances"); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 969 (D. Minn. 1998) (dismissing claim that employment benefits were contingent on submitting to unwanted sexual advances because defendant did not make any threats in connection with the harassment).

IV.

Zaitz contends that the district court erred by dismissing her claim that respondents terminated her in retaliation for her complaints about Grabarski's inappropriate conduct. We disagree.

The MHRA declares that it is an unfair discriminatory practice to intentionally engage in reprisal against any person because that person "opposed a practice forbidden under this chapter or has filed a charge . . . or participated in any manner in an investigation . . . under this chapter." Minn. Stat. § 363A.15 (2010). "A reprisal includes

. . . any form of intimidation, retaliation, or harassment." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 81 (Minn. 2010) (emphases omitted). "[T]o establish a prima facie case for a reprisal claim, a plaintiff . . . must establish the following elements: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Id.* (quotation omitted).

Zaitz has failed to present evidence to support the third element of her reprisal claim: a causal connection between her statutorily protected conduct and her termination. In her amended complaint, Zaitz stated that she complained to Hopp about (1) the September 2003 kiss and (2) Grabarski's use of profanity at the restaurant on January 27, 2005. But according to Zaitz's own testimony, she made these complaints during her January 31, 2005 meeting with Grabarski and Hopp after she had learned of the decision to terminate her employment. And there is no evidence in the record that Zaitz complained to Hopp on any other occasion about Grabarski's behavior.

Because Zaitz has failed to show that her complaints to Hopp preceded her termination, she has failed to establish a causal connection. *See Dietrich*, 536 N.W.2d at 327 (stating that a causal connection is demonstrated "by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action *follows* closely in time" (quotation omitted) (emphasis added)); *see also Slattery v. Swiss Reins. Am. Corp.*, 248 F.3d 87, 95 (2d. Cir. 2001) (holding that retaliation could not be inferred where "timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity).

V.

Finally, Zaitz argues that the district court erred by dismissing her intentional-tort claims of assault and battery. Zaitz contends that Grabarski committed both an assault and a battery when he kissed her in September 2003. But Zaitz commenced this lawsuit more than two years after the kiss. Thus, the assault and battery claims are barred by the statute of limitations. *See* Minn. Stat. § 541.07(1) (2010) (requiring that claims of assault or battery be brought within two years of the injury).

Affirmed.