STATE OF MINNESOTA
IN COURT OF APPEALS
A11-225

Arthur Ray McCoy,
Appellant,

vs.

Metropolitan State University,
Respondent.

Filed September 6, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-10-510

Leslie L. Lienemann, Celeste E. Culberth, Culberth & Lienemann, LLP, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Gary R. Cunningham, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Justin D. Cummins, Miller O'Brien Cummins, PLLP, Minneapolis, Minnesota; and

Frances E. Baillon, Halunen & Associates, PA, Minneapolis, Minnesota (for amicus curiae National Employment Lawyers Association, Minnesota Chapter)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's grant of summary judgment on his claim of reprisal in violation of the Minnesota Human Rights Act. Because we conclude that the district court did not err in its legal analysis and because there are no genuine issues of material fact as to whether appellant engaged in statutorily protected conduct, we affirm.

FACTS

Appellant Arthur Ray McCoy was hired by respondent Metropolitan State University (MSU) in July 2006 as associate vice-president for student affairs. In May 2007, McCoy was appointed interim vice-president for student affairs. In his interim position, McCoy reported directly to MSU's president; he was responsible for supervising Robert Bode, the director of financial aid, and Daryl Johnson, the director of the registrar. After McCoy's interim appointment, Dr. William Lowe was appointed to be interim president of MSU.

In August 2007, Bode approached McCoy to discuss a personnel issue that he was having with Luantha Ross, an associate director in his department. Bode reported that Ross had been involved in an altercation with another staff member and that other employees had reported that Ross engaged in intimidating behavior. Bode expressed his opinion that Ross should be given an oral reprimand and a performance-improvement plan. McCoy approved of Bode's proposed course of action and further directed Bode to provide Ross with coaching and to encourage department staff to accept Ross's role in

the department. After Bode's discussions with Ross, Bode concluded that a performance-improvement plan was unnecessary. Following Bode's reprimand of Ross, McCoy observed that Bode was "engag[ing] in conduct designed to isolate, exclude, and marginalize [Ross]."

Bode later decided to promote Laura Jensen to the position of assistant director in his department, a position that reported directly to Bode. Before Jensen's promotion, Ross was the only staff member who reported directly to Bode. The promotion resulted in the creation of two "silos" in the department, with Ross in charge of production and Jensen in charge of service. Jensen's promotion did not result in any decrease in pay or benefits with respect to Ross. But McCoy saw Jensen's promotion as an effective demotion of Ross and did not support Bode's decision to promote Jensen. McCoy told Bode to reinforce Ross's role as associate director in the department. When Bode later realized that Jensen's promotion was causing problems in his department, McCoy offered to tell department staff that it was McCoy who was undoing the new structure in favor of one where Ross would be the only second in command.

In December 2007, Bode informed McCoy that he did not intend to renew Ross's contract when it came up for renewal in 2008. McCoy instructed Bode to keep coaching Ross and to give her more opportunities to improve. In a subsequent meeting, McCoy told Lowe that "the conduct [Bode] exhibited toward [Ross] was discriminatory and harassing," and McCoy asked Lowe to investigate. In his deposition, McCoy stated that his complaint of discrimination was based on the fact that he thought Bode was favoring all of his employees over Ross, including other women.

During this same time, McCoy was also in discussions with Johnson about a member of his staff in the registrar's office. Sarah Shroyer was hired as a management analyst in the office. Johnson evaluated Shroyer's performance during her probationary period in what both Shroyer and McCoy characterized as an "unscheduled" performance review. Johnson drafted an evaluation for Shroyer's review that was critical of her job performance. Shroyer reacted negatively to Johnson's evaluation and asserted that it was false and inaccurate.

Johnson and Shroyer met with McCoy to discuss Shroyer's review. When Shroyer confronted Johnson about inaccuracies in the review, Johnson stated that he was "afraid of [Shroyer] because [she is] a strong woman." McCoy told Johnson to redraft Shroyer's performance review. After this meeting, Johnson drafted a performance review that contained higher ratings, and this review was signed by Shroyer. The original review was never put in Shroyer's personnel file.

After the performance review, it was Shroyer's opinion that Johnson began to ignore her. She expressed this to McCoy. McCoy met with Shroyer and "suggested that [she] submit to him a position description for a role that reported to [McCoy]." For the next one to two months, Shroyer performed the same work but under McCoy's direction. In response, Johnson, along with other directors, met with Lowe to discuss several concerns they had about McCoy, including Shroyer's new role under McCoy's supervision.

Lowe met with McCoy to address McCoy's progress on implementing an Upward Bound grant at MSU and to discuss personnel issues in some of the departments. Lowe

told McCoy that he would not tolerate what the directors described as McCoy's "lawyering" behavior and that the department directors were upset by McCoy's interference in their departments. McCoy wanted Lowe to talk to subordinates—Lowe refused. At this meeting, McCoy advised Lowe that he thought that "[Johnson's] behavior toward [Shroyer] amounted to discrimination." Lowe informed McCoy that he would not investigate these allegations. He also told McCoy not to interfere with the directors and to "act as if his job depended on it." McCoy offered to resign his interim post, but Lowe stated that he did not want McCoy to resign. Instead, Lowe instructed McCoy to write a memorandum and reverse his decisions with respect to the subordinate employees of other departments. McCoy did so and also told the directors that Shroyer would resume her regular role under Johnson's supervision.

In April 2008, Bode contacted Lowe and informed him that McCoy had "resumed regular private meetings with [Ross]" and that Ross's attitude "[was] increasingly hostile toward [Bode] and other members of our department." Lowe again met with McCoy and asked if he had been meeting privately with Ross on a regular basis. It was Lowe's intent to fire McCoy at this meeting. McCoy characterized his interactions with Ross as infrequent and non-work-related, and his employment was not terminated that day.

On April 30, 2008, Lowe prepared notes in advance of a meeting with McCoy, which included a notation: "Target – 13/5/08 notice," and acknowledged that he had decided to terminate McCoy by that date. Lowe provided McCoy with notice of his termination on May 13, 2008. Lowe informed McCoy that his termination was due to

numerous problems, including McCoy's work implementing the Upward Bound grant and his interference in the work of department directors.

McCoy brought a reprisal claim against MSU pursuant to the Minnesota Human Rights Act (MHRA). MSU answered and moved for summary judgment. The district court granted MSU's motion for summary judgment, concluding that McCoy had failed to identify any adverse employment action taken against Ross and Shroyer at the time that he voiced his complaint of discrimination and, therefore, McCoy lacked a good-faith, reasonable belief that he was opposing discriminatory conduct. This appeal follows.

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). 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).

Under the MHRA, 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) (emphasis omitted) (quotation omitted). To defeat summary judgment, a plaintiff must produce either direct evidence of reprisal or create an inference of reprisal under the *McDonnell-Douglas* burden-shifting framework. *Friend v. Gopher, Co.*, 771 N.W.2d 33, 37-38 (Minn. App. 2009), *review denied* (Minn. Nov. 23, 2010); *see also Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010).

I.

McCoy contends that he provided evidence of reprisal that is sufficient to overcome summary judgment using the direct method of proof. The direct method requires the plaintiff to put forth direct or circumstantial evidence that "show[s] 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." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (quotation omitted); *see also Friend*, 771 N.W.2d at 40 (clarifying that a plaintiff may use direct or circumstantial evidence under the direct method). "In contrast to the process of elimination that takes place under *McDonnell-Douglas*, direct-evidence cases are adjudicated based on the strength of affirmative evidence of discriminatory motive." *Friend*, 771 N.W.2d at 38 (citing *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)).

McCoy argues that Lowe's acknowledgement that McCoy's termination was due in part to McCoy's interference with Bode and Johnson is strong, direct evidence of reprisal. McCoy points to Lowe's statement that McCoy should stop interfering in their departments and to "act as if his job depended on it" as strong evidence of reprisal. We

disagree. This evidence does not provide a strong link between McCoy's report of alleged discriminatory practices and his termination; it shows only that McCoy was fired from MSU for his management of the departments. McCoy must provide evidence that "clearly points to the presence of an illegal motive" in order to defeat summary judgment under the direct method. *See Griffith*, 387 F.3d at 736. We conclude that McCoy has not met his burden based on this evidence. Therefore, we examine McCoy's reprisal claim under the *McDonnell-Douglas* test.

II.

Under the burden-shifting framework of *McDonnell-Douglas*, McCoy has the initial burden of establishing a prima facie case of reprisal. *See Potter v. Ernst & Young, LLP*, 622 N.W.2d 141, 145 (Minn. App. 2001). "[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." *Bahr*, 788 N.W.2d at 81 (quotation omitted).

A plaintiff engages in statutorily protected conduct when he voices opposition to an employer's discriminatory practices. Minn. Stat. §§ 363A.08, subd. 2, .15 (2010). An employer engages in discriminatory practices by subjecting employees to an adverse employment action on the basis of their gender. Minn. Stat. § 363A.08, subd. 2; *Bahr*, 788 N.W.2d at 82-83. Therefore, a plaintiff claiming reprisal must make a showing that employees were subjected to "some tangible change in duties or working conditions," which prompted the plaintiff's opposition to such discriminatory practices. *Bahr*, 788 N.W.2d at 83. Actions such as termination, reduction in pay, and "changes in

employment that significantly affect an employee's future career prospects meet this standard," whereas "minor changes in working conditions that merely inconvenience an employee or alter an employee's work responsibilities do not." *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 549 (8th Cir. 2008) (quotations omitted).

McCoy is not required to prove the underlying merits of a discrimination claim, but he must be able to demonstrate that he had a good-faith, reasonable belief that the conduct he opposed was a violation of the MHRA. *Bahr*, 788 N.W.2d at 84. A good-faith, reasonable belief "must be connected to the substantive law," and McCoy may not "rely entirely on [his] own reasoning and sense of what is discriminatory." *Id.* at 83-84. Therefore, in order to overcome a motion for summary judgment, there must be a genuine issue of material fact as to whether Ross and Shroyer were subjected to adverse working conditions such that McCoy's subsequent allegation of discrimination was, in fact, based on a good-faith, reasonable belief.

Regarding Shroyer, McCoy stated that he based his discrimination complaint on the fact that Johnson had written an inaccurate performance review of Shroyer and Johnson's statement that he was scared of "strong women." Regarding Ross, McCoy complained of discrimination after Bode promoted Jensen to be assistant director of the financial-aid department, moving her from a position as Ross's subordinate to one on an equal level with Ross. But even viewing this evidence in a light most favorable to McCoy, we conclude that there is insufficient evidence from which a jury could determine that McCoy had a good-faith, reasonable belief that these actions by MSU directors amounted to gender discrimination.

Neither Shroyer nor Ross was subjected to an adverse employment action that would allow an inference of unlawful gender discrimination by MSU. Shroyer was not terminated, demoted, or subjected to a significant alteration in her job responsibilities such that a reasonable person could conclude that she was being discriminated against based on her gender. Johnson wrote a performance review of Shroyer that, according to Shroyer and McCoy, contained false and unsubstantiated information about her performance. McCoy asserts that the reason Johnson included these false statements was because he is intimidated by strong women. But even taking this assertion as true, there was no corresponding adverse action taken with respect to Shroyer's job at MSU, and the draft performance review was replaced with an accurate, positive review that was placed in Shroyer's personnel file.

McCoy cites an Eighth Circuit case to support his assertion that Johnson "papered" Shroyer's file, thereby resulting in an adverse employment action. In *Kim v. Nash Finch Co.*, the Eighth Circuit affirmed a jury verdict on a claim of retaliation. 123 F.3d 1046, 1060 (8th Cir. 1997). The circuit court noted that after the plaintiff brought a claim of racial discrimination, he was subjected to negative reports, two reprimands, lower performance reviews than he received before the complaint, reduced job duties, and required to participate in remedial training. *Id.* The evidence that his employer had "papered" his file included two written reprimands. *Id.* Here, Johnson's negative performance review of Shroyer did not become part of her file. And there is no additional evidence that Johnson "papered" Shroyer's file with negative reviews.

Appellant also cites an unpublished case from the federal district of New Hampshire to support his argument that Johnson's statement that he was "scared of strong women" constituted adverse employment action. In *Gastas v. Manchester Sch. Dist.*, the employer told an applicant that she would not be hired because she was a "strong, aggressive woman," and the district court concluded that the remark could be interpreted in two ways: one related to an aggressive style, one related to gender. No. 05-CV-315-SM, 2006 WL 3240731, at *4-5 (D.N.H. Nov. 7, 2006). As a result, the district court concluded that the plaintiff's claim could survive summary judgment because the comment could be seen as discriminatory. *Id.* at *5-6. Importantly, the district court did not hold that the comment in and of itself constituted adverse employment action. *Id.* at *5. The district court concluded that a reasonable jury could find that the plaintiff was not hired because of her gender. *Id.* Thus, even if this case had precedential value in our jurisdiction, its holding does not support McCoy's contention that Johnson's comment constituted adverse employment action.

McCoy's arguments regarding Ross fail for similar reasons. Bode's decision to promote Jensen did not result in an adverse employment action with respect to Ross. Ross retained her same position with the same pay, and there are no facts demonstrating that any subsequent change in her job duties constituted a "material employment disadvantage." *See Bahr*, 788 N.W.2d at 83; *see also Spears v. Miss. Dep't of Corr.*, 210 F.3d 850, 854 (8th Cir. 2000) (concluding that an employee failed to demonstrate an adverse working condition when her transfer to a new facility had no affect on her salary, benefits, or other material aspects of her employment); *Ledergerber v. Stangler*, 122 F.3d

1142, 1144 (8th Cir. 1997) (recognizing that an alteration of job responsibilities did not constitute an adverse employment action when the title, benefits, and pay remained the same). As noted by the district court, Bode promoted another woman to work in a position that was parallel to Ross's, undermining the reasonableness of McCoy's belief that Bode was engaging in unlawful gender discrimination. McCoy also asserts that the non-renewal of Ross's contract constitutes unlawful discrimination. While it is undisputed that Ross's contract was not renewed in June 2009, this act occurred after McCoy voiced his opposition to the alleged discriminatory conduct. An event that occurs after a person voices concern with an allegedly discriminatory practice cannot reasonably contribute to the person's good-faith belief at the time that it was articulated.

Based on this record, we conclude that McCoy has failed to demonstrate an issue of material fact with respect to his claim that he engaged in statutorily protected conduct. Because there is no evidence that Shroyer and Ross suffered from any adverse employment action that would permit a reasonable person to infer that unlawful gender discrimination was involved, McCoy's reprisal claim fails on this prong of the prima facie case. Therefore, we do not address the remainder of the *McDonnell-Douglas* framework.

Affirmed.