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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-837**

Sean Coddens,
Appellant,

vs.

SuperValu, Inc.,
Respondent.

**Filed January 9, 2012
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CV-09-26373

Joni M. Thome, Frances E. Baillon, Halunen & Associates, Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

CONNOLLY, Judge

In this appeal from judgment following a court trial, appellant-employee challenges the district court's determination that respondent-employer did not engage in

employment discrimination against appellant under the Minnesota Human Rights Act (MHRA). Because the district court's findings of fact are not clearly erroneous, and because the district court did not err when applying the law to the facts, we affirm.

FACTS

On March 17, 2008, appellant Sean Coddens began working at respondent SuperValu, Inc. as a training analyst in the IT department. Coddens's job involved developing online instructional tools used to train other SuperValu employees. Coddens worked under the direct supervision of senior manager Maureen Carlson, who reported to the director of IT communications, Erika Cobb. Coddens and the other members of the IT training team worked in cubicles. Coddens worked in several temporary cubicles until June 2008, when he and the rest of his group moved to a new area of SuperValu's Eden Prairie office. Coddens spoke with Carlson, and expressed his desire to remain in his current cubicle because it was quieter, but his request was denied because the company wanted to keep the IT group together in one area. Sometime after moving to the new cubicle, Coddens again spoke with Carlson to request higher cubicle walls because the noise level was distracting and made it difficult to concentrate. Carlson informed Coddens that the higher walls were for managers only and recommended that Coddens use headphones to mitigate the distracting noise level. Carlson also told Coddens he could reserve a conference room to work in, or work from home. Coddens found that the headphones "helped a little bit" and did not make any further requests.

In July 2008, Carlson assigned Coddens to a lead role in an online learning project. During Coddens's work on the project, Carlson observed problems with his

performance, including difficulties with written and oral communications. Carlson routinely coached Coddens in his work, and when the project increased in scope, Carlson and other coworkers worked with Coddens to make the project more manageable. In late summer 2008, when Coddens spoke with Carlson and expressed his anxiety about layoffs occurring throughout the company, Carlson suggested that Coddens see a therapist, and later gave Coddens a book about dealing with worry and anxiety. Throughout the course of their working relationship, Coddens expressed his opinion that Carlson unfairly criticized his work, and that her behavior toward him contributed to his anxiety. Coddens met with Cobb and told her his concerns about how Carlson treated him. Cobb noted Carlson's abrupt management style, and spoke with Carlson about Coddens's concerns.

In September 2008, Coddens informed Carlson that he had been diagnosed with Attention Deficit Disorder (ADD) and anxiety disorder. Coddens did not provide any documentation confirming the diagnosis or indicating that his ability to perform his job was limited, or that he required workplace accommodations. Later in the same month, Carlson spoke with Cobb about Coddens's ongoing performance deficiencies. Carlson also consulted with Pamela Nielsen, an IT human resource partner, and they determined that Coddens should be placed on a Performance Improvement Action Plan (PIAP). Coddens received the PIAP in November 2008 during a meeting with Carlson, Cobb, and HR associate Kelly Vinson-Taylor. The PIAP outlined areas where Coddens needed to improve his job performance, including the need to improve his written and oral communication skills, as well as the requirement that he complete projects independently without ongoing feedback and peer reviews. The PIAP also provided that Coddens "must

demonstrate immediate improvement” or be “subject to further discipline, up to and including termination, without further notice.” Coddens did not request any accommodation to assist in meeting the PIAP goals.

Coddens’s work improved slightly, but remained below expectations. Coddens continued to express his concerns about Carlson’s treatment of him. Cobb discussed the situation with Carlson, and Carlson acknowledged that she had informed Coddens that his performance remained below the standards for his position. When Coddens, Carlson, Cobb, and Vinson-Taylor met to review the PIAP on January 28, 2009, Coddens was informed that he was still not meeting performance expectations and was placed on a final warning. Coddens again did not request any assistance or accommodations. On February 5, Carlson provided Nielsen and Cobb with an update on Coddens’s performance, and expressed her opinion that it was time to proceed with terminating Coddens’s employment. On February 5 and 6, Coddens again complained about Carlson’s treatment of him to Vinson-Taylor and asked to be moved to a different department. After Carlson, Cobb, and Nielsen determined that Coddens showed no signs of immediate, sustained improvement, SuperValu terminated Coddens’s employment on March 6, 2009.¹

On September 21, 2009, Coddens initiated this action against SuperValu, alleging disability discrimination, hostile work environment, and retaliation under the MHRA,

¹ In October 2009, Coddens obtained employment with Federal Express as a package handler, is a member of the company’s management program, and has taken all the classes necessary to make him eligible for a management position at Federal Express.

Minn. Stat. §§ 363A.01-.43 (2010). A trial was held from September 13 to September 20, 2010. At both parties' request, an advisory jury was impaneled. The jury found in Coddens's favor on all claims, and recommended that Coddens receive more than \$100,000 in damages. The district court "decline[d] to adopt the jury's verdict," determining that "the evidence [did] not support the verdict," and entered judgment in favor of SuperValu on all claims. The district court denied Coddens's posttrial motions on March 2, 2011. This appeal follows.

DECISION

Although the district court submitted Coddens's discrimination claim to an advisory jury, the district court's findings are regarded as those of the court sitting without a jury.² *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983). We review the district court's findings of fact for clear error. Minn. R. Civ. P. 52.01. The district court's findings of fact should be sustained if they are reasonably supported by evidence in the record considered as a whole. *Hubbard*, 330 N.W.2d at 441. And due regard must be given to the district court's opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01. But an appeal from a district court's judgment on

² While Coddens emphasizes that the advisory jury found in his favor, Minnesota law requires claims brought under the MHRA to be determined by the district court, not a jury. Minn. Stat. § 363A.33, subd. 6. The district court is required to make its own findings and is not required to adopt the advisory jury's findings as its own. Minn. R. Civ. P. 52.01; *see also Doan v. Medtronic, Inc.*, 560 N.W.2d 100, 105 (Minn. App. 1997), (stating obligation of district court in MHRA claims) *review denied* (Minn. May 13, 1997). Because Minnesota law does not allow for a binding jury verdict on an MHRA claim, the district court committed no error in using the jury in an advisory capacity.

claims brought under the MHRA involves statutory interpretation, which is a question of law subject to de novo review. *Hince v. O'Keefe*, 632 N.W.2d 577, 582 (Minn. 2001).

I. The district court's determination that Coddens failed to prove his disability discrimination claim is not clearly erroneous.

The MHRA prohibits discharge of an employee because of that employee's disability. Minn. Stat. § 363A.08, subd. 2. Disability-discrimination claims under the MHRA are analyzed under the shifting-burden analysis articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Under that analysis, a plaintiff alleging discriminatory discharge must first demonstrate a prima facie case by showing that (1) he is a member of a protected class; (2) he was qualified for the position from which he was discharged; and (3) he was replaced by a non-member of the protected class. *Id.* If the plaintiff meets that burden, the burden of production shifts to the defendant, who must put forth evidence of a legitimate, nondiscriminatory reason for the discharge. *Id.* If the defendant meets that burden, the presumption of discrimination created by the prima facie case disappears, and the plaintiff has the burden of demonstrating that the reasons for discharge articulated by the defendant are a "pretext for discrimination." *Id.*

In a detailed and well-written opinion, the district court determined that Coddens did not establish a prima facie case of disability discrimination. While recognizing that it is "undisputed" that Coddens suffers from ADD and anxiety disorder, the district court determined that Coddens failed to prove that these disorders "materially limit any of his

major life activities,” and found that Coddens’s “description of his difficulties are conclusory only, lacking in the evidentiary proof necessary to sustain a viable claim.” The district court emphasized that Coddens only “made general statements” to support his claim, and offered insufficient testimony to demonstrate that his disorders affected his ability to work, materially interfered with his ability to perform a broad range of jobs, or significantly restricted his abilities as compared to those of an average person. The district court also determined that Coddens’s work history “belies any claim that [he] is disabled for purposes of the MHRA.” While the district court did not expressly address the other *McDonnell Douglas* factors or the burden-shifting analysis, it stated that “the evidence established that there were legitimate reasons” for Coddens’s termination—that he “failed to perform his job up to the reasonable expectations of his employer”—and that Coddens failed to demonstrate that this reason was a pretext for disability discrimination.³

Coddens contends that the district court erred in determining that he is not disabled within the meaning of the statute. The MHRA defines a disabled person as “any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.”⁴ Minn. Stat. § 363A.03, subd. 12. “The degree to which a

³ Because the district court determined that Coddens was not disabled, it also determined that “SuperValu had no duty to make a reasonable accommodation.”

⁴ The federal Americans with Disabilities Act requires a substantial limitation rather than material limitation. 42 U.S.C. § 12102(2) (2006). In *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 & n.3 (Minn. 1995), the supreme court recognized that the

condition limits one or more major life activities is evaluated based on the plaintiff's specific circumstances.” *Hoover*, 632 N.W.2d at 543. Work is a major life activity within the meaning of the MHRA. *Id.*; *Sigurdson*, 532 N.W.2d at 228. To determine whether a person is materially impaired from the major life activity of work, we consider whether the person is restricted in an ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *State by Cooper v. Hennepin County*, 441 N.W.2d 106, 111 (Minn. 1989).

Coddens primarily challenges the district court's factual findings related to his claims, and he requests a new trial, or that the case be remanded “for findings consistent with the advisory jury's verdict.” He argues that the record supports that he is materially limited in major life activities of work, thinking, concentrating, and communicating, emphasizing that he “shuts down” when his anxiety gets too high, and that distractions cause him to lose the ability to focus or concentrate. We disagree.

The district court's determination that Coddens is not disabled within the meaning of the statute is not clearly erroneous. The documentation of Coddens's work performance issues predates his diagnosis with ADD and anxiety disorder. And Coddens admitted that both prior to and after his diagnosis of ADD and anxiety he was “able to perform all of the duties” required of him in his position. This testimony contradicts his

1989 amendment to the MHRA definition of “disability,” changing “substantially limits” to “materially limits,” 1989 Minn. Laws ch. 280, § 1, at 1099-1100, made the state law definition different from and less stringent than the federal definition of a disability. *See Hoover*, 632 N.W.2d at 543, n.5.

claims that he was “materially limited” in his major life activities to an extent to be considered disabled within the meaning of the statute. That the jury and the district court disagreed in their determinations does not entitle Coddens to a new trial. The district court credited or agreed with Carlson’s and Cobb’s description of Coddens’s job performance and the events. We give due regard to the district court’s opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01. And this court does not, effectively, retry a case to create new factual findings. *See Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424-25, 108 N.W.2d 347, 351 (1961) (where the record “confronts us with much conflicting evidence, it is well settled that findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole, even though we might find the facts to be different if we had the factfinding function.”).

Accordingly, though Coddens does not agree with the district court’s findings, the court’s determinations are not “manifestly and palpably contrary” to the record evidence. On this record, the district court correctly applied the law and did not clearly err in determining that Coddens failed to establish a prima facie case of disability discrimination under the MHRA.

II. The district court did not err in determining that SuperValu did not create a hostile work environment.

To prevail on a hostile work environment claim, a plaintiff must show (1) membership in a protected group; (2) the occurrence of unwelcome harassment; (3) a causal nexus between the harassment and his or her membership in the protected group;

and (4) that the harassment affected a term, condition, or privilege of employment. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 571, n.11 (Minn. 2008). A court looks at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Wenigar v. Johnson*, 712 N.W.2d 190, 207 (Minn. App. 2006). "[I]n order to be actionable, harassment must be both subjectively hostile or abusive to the victim and severe and pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.* at 206 (quotation omitted).

The district court determined that, while Coddens testified to feeling harassed by Carlson's treatment toward him, "he failed to show, by the greater weight of the evidence, that her conduct was objectively so hostile so as to affect a term or condition of his employment." The district court acknowledged Coddens's complaints that Carlson would roll her eyes, speak in an abrupt manner, and criticize his job performance, but emphasized that such conduct "fails to rise to the requisite level of hostility necessary to establish a claim of hostile work environment." The district court also reiterated that Coddens's claim fails because "he is not a member of a protected group," based on its earlier determination that Coddens failed to establish that he is disabled within the meaning of the MHRA statutes.

Coddens argues that the district court minimized the evidence he offered in support of his claim. He argues that Carlson's behavior toward him was "hostile and

intimidating,” because he was given a PIAP and was warned that he could be terminated if his work did not improve. We are not persuaded by this argument. Even if Coddens is considered a member of a protected class, Carlson’s alleged conduct is not “severe and pervasive enough” that it serves to create “an environment that a reasonable person would find hostile or abusive.” *See id.* In *Wenigar*, a mentally-disabled employee established a hostile-work-environment claim when his employer and other coworkers “referred to him as slow and often made derogatory comments as a result of his IQ and limited mental capacity,” including referring to the employee with explicit profanity. *Id.* The employer was aware of the name calling and even participated in harassing the employee with profanity-laced epithets. *Id.* There is no evidence in this record that rises to an analogous level of hostility such that a reasonable person would find the work environment to be hostile or abusive. Accordingly, we conclude that the district court correctly applied the law and did not clearly err in denying relief on Coddens’s hostile-work-environment claim.

III. The district court did not err in determining that Coddens’s termination was not retaliatory.

The MHRA prohibits reprisal against an individual for taking action protected by the act. Minn. Stat. § 363A.15. A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. Minn. Stat. § 363A.15(2). A reprisal claim is also analyzed under the *McDonnell Douglas* burden-shifting test. *Hoover*, 632 N.W.2d at 548. To establish a prima facie case of retaliatory discharge, the employee must show (1) statutorily-protected conduct by the employee; (2) adverse employment action by the

employer; and (3) a causal connection between the two. *Hubbard*, 330 N.W.2d at 444. A causal connection is established by “a showing that an employer’s retaliatory motive played a part in the adverse employment action.” *Kipp v. Missouri Highway & Transp. Comm’n*, 280 F.3d 893, 897 (8th Cir. 2002) (quotation omitted). Each element must be proved by a preponderance of the evidence. *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986). If the employee establishes a prima facie reprisal case, the burden then shifts to the employer to show legitimate, nondiscriminatory reasons for its actions. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999). If the employer meets this burden, the burden shifts back to the employee to demonstrate that the employer’s reasons were actually a pretext for discrimination. *Id.*

The district court determined that Coddens “failed to show that he engaged in protected conduct prior to being placed on the PIAP in November 2008.” The district court emphasized that, in making complaints to Cobb about Carlson’s feedback about his work performance, Coddens “did not state that Carlson was discriminating against him because of his alleged disabilities.” Finding no statutorily-protected conduct, the district court determined that Coddens “did not prove, by a fair preponderance of the evidence, that Carlson and/or SuperValu were motivated by retaliatory intentions and the evidence does not otherwise support such an inference.” The district court also determined that Coddens failed to establish a causal connection between his complaint to HR Manager Vinson-Taylor of a hostile work environment and his termination, because the recommendation that Coddens be discharged occurred before Vinson-Taylor was aware of the complaint.

Coddens argues that the district court erred in determining that Coddens did not engage in protected conduct prior to the PIAP and his termination, arguing that the district court minimized his requests for cubicle modifications and his complaints about Carlson's treatment toward him. SuperValu contends that Coddens's arguments simply amount to a "disagreement" with the district court's assessment of the evidence, and that Coddens failed to prove that he engaged in protected conduct "prior to the criticisms of his performance" and resulting termination. SuperValu also argues that, even if Coddens could establish a prima facie case of retaliation, he failed to demonstrate that SuperValu's reasons for terminating him were a pretext for retaliation.

We agree with SuperValu. The district court's determinations are not clearly erroneous. Notwithstanding Coddens's complaints about feeling "singled out" and being treated unfairly by Carlson, record evidence supports the district court's determination that Coddens's termination was the result of ongoing performance issues that were not remedied. The issues with Coddens's work performance began prior to any diagnosis, and even following the diagnosis, Coddens maintained that he did not require accommodations because he was "able to perform all of the duties" required of him in his position. *See Smith v. Ashland, Inc.*, 250 F.3d 1167, 1173-74 (8th Cir. 2001) (stating that when employer began documenting problems with employee's performance before employee complained of hostile work environment, the inference of retaliation based on proximity between statutorily protected conduct and termination is not supported); *see also Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988) (holding that protection from complaining about illegal activity in workplace does not insulate an

employee from the consequences of inadequate work performance). And to the extent that the district court viewed the testimony of Coddens, Carlson, and Cobb differently than Coddens or the advisory jury, such findings and credibility determinations are entitled to deference. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). On this record, the district court's determinations are not clearly erroneous, and Coddens did not meet his burden under the applicable law to prove by a preponderance of the evidence that his termination was retaliatory.

IV. The district court did not abuse its discretion in excluding evidence relating to the termination of another SuperValu employee.

“The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). “Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the [district] court's sound discretion and will only be reversed when that discretion has been clearly abused.” *Johnson v. Washington Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted). The admissibility of so-called “me too” evidence in an employment discrimination case “depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388, 128 S. Ct. 1140, 1146-47 (2008). And “[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining

party's ability to demonstrate prejudicial error." *Kroning*, 567 N.W.2d at 46 (quotation omitted).

Prior to the trial, the district court granted SuperValu's motion in limine to exclude the evidence relating to Carlson's termination of the other employee. The district court excluded the proffered evidence as "irrelevant" under Minn. R. Evid. 402, and having only a "marginal probative value" that was substantially outweighed by considerations of undue delay and a waste of time under Minn. R. Evid. 403.

Coddens argues that evidence related to the other employee's termination is relevant to show that Carlson retaliated against employees who complained about her, and demonstrates that Carlson harassed employees and created a hostile work environment. He also contends that the evidence is relevant to assessing the credibility of SuperValu's witnesses. He notes that "retaliatory motive is difficult to prove by direct evidence and that an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley v. City of Otsego*, 623 N.W.2d 625, 632 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). Coddens also emphasizes that Carlson was the "same decision-maker" for both employees, making the evidence probative of Carlson's intent to discriminate. *See* Minn. R. Evid. 404(b) (stating that evidence of another wrong may be admissible as proof of intent).

Coddens relies primarily on *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1286 (11th Cir. 2008). In that case, the plaintiff sued his employer for racial discrimination and retaliation, claiming he was treated differently from white employees and suffered retaliation after filing discrimination charges against the company.

Goldsmith, 513 F.3d at 1269-74. Two other employees were also terminated after complaining of racial discrimination. *Id.* at 1273. In holding that the “me too” evidence was admissible under Rule 404(b) to prove the intent of the employer to discriminate and retaliate, the Eleventh Circuit specifically noted that each employee was discriminated against by the same supervisor and had similar “experiences” such that the evidence was probative of the supervisor’s intent. *Id.* at 1286. Coddens argues that he and the other employee had similar experiences because they both were terminated by Carlson.

The district court acted within its discretion in not admitting the evidence. First, the district court reasoned that the circumstances surrounding the other employee’s termination are “not similar,” nor are the claims “closely related,” because the previous case involved allegations of sexual harassment and occurred two years prior to Coddens’s termination. While Carlson is the same supervisor in both instances, the district court properly emphasized that this case is distinguishable from *Goldsmith* because Coddens “failed to present evidence of multiple similar incidents of retaliation against persons in the same protected class.” Second, in determining that the evidence was also inadmissible under Rule 403 as a “waste of time” and “misleading,” the district court emphasized that it did not want to entertain “tangents” related to the circumstances surrounding the other employee’s termination. Accordingly, the district court examined the evidence, considered how closely it related to Coddens’s claims, and determined that it was inadmissible under multiple rules of evidence. On this record, we discern no abuse of discretion in granting SuperValu’s motion in limine to exclude the evidence.

Affirmed.