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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0817

Gamachu M. Beyena,
Appellant,

vs.

Sunburst Transit, LLC, et al.,
Respondents.

Filed December 17, 2012
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CV-11-9053

Gamachu M. Beyena, St. Paul, Minnesota (pro se appellant)

Thomas R. Revnew, Tara R. Craft, Seaton, Peters & Revnew, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's dismissal of all claims in his complaint under Minn. R. Civ. P. 12.02(e). Because appellant failed to allege sufficient facts to state a claim upon which relief can be granted, we affirm.

FACTS

Appellant Gamachu Beyena sued respondents Sunburst Transit LLC and Seak-Kee Chew, alleging that respondents violated the Minnesota Human Rights Act (MHRA) by discriminating against him on the basis of his race and disability and by retaliating against him for filing a complaint with the Equal Employment Opportunity Commission (EEOC). Beyena also alleged that respondents committed a variety of intentional torts against him.

On appeal, Beyena alleges that he is a native Ethiopian and that he was employed as a bus driver with Sunburst and worked under Chew as his manager. In June 2010, Beyena dislocated and fractured his elbow in a bicycle accident and consequently could not return to work until December 2010, when Chew placed Beyena's name on the substitute-driver list.

Sometime between his accident and Chew placing him on the substitute-driver list, Beyena applied for unemployment benefits. Chew, on behalf of Sunburst, submitted a letter to the Minnesota Department of Employment and Economic Development (DEED), contesting Beyena's eligibility for unemployment benefits and claiming that Beyena voluntarily quit his employment. In the letter, instead of referring to Beyena, Chew once referred to "Mr. Tura," an Ethiopian whom Sunburst formerly employed. Beyena believes that Chew's reference to Tura is evidence of respondents' discrimination against Ethiopians, and Beyena confronted Chew about his reference to Tura. Beyena claims that Chew first told him that the reference to Tura was a typographical error but then said that a Sunburst employee named Jodi wrote the letter and substituted Tura's name for

Beyena's to discriminate against Beyena and Tura because they are both Ethiopian. At the motion hearing in district court, Beyena stated that he does not believe Chew's explanation because he knows Jodi and worked well with her.

DEED determined that Beyena was eligible for unemployment benefits because he was forced to quit his employment when Sunburst refused to provide him reasonable accommodation for his bicycling injury despite his request. Sunburst appealed the eligibility determination and offered Beyena employment of 35 hours per week conditioned on Beyena's withdrawal of his application for unemployment benefits. Beyena accepted the employment offer of 35 hours per week and attempted to withdraw his unemployment application but could not do so. Chew told Beyena not to worry about it and to return to work. An unemployment-law judge (ULJ) subsequently decided that Beyena is ineligible for unemployment benefits. Beyena appealed the ULJ's decision.

After Beyena returned to work, Sunburst held an employee meeting at which it circulated a list of its employees that did not include Beyena's name. Although Beyena continued to work for Sunburst for several more months, he believes that the exclusion of his name from the list constitutes evidence that Sunburst illegally discharged him from employment after he sustained bicycle-accident injuries in June 2010.

On March 31, 2011, Beyena filed a charge of discrimination with the EEOC in which he alleged race and disability discrimination by respondents on the basis that they did not accommodate his disability and did not provide him with promised hours of work.

On April 12, 2011, Saint Paul Public Schools, a Sunburst customer, sent Sunburst a letter informing it that Beyena was permanently removed from all service to the Saint

Paul Public Schools. On April 14, Sunburst discharged Beyena for excessive speeding, apparently based on reports from a GPS unit on Beyena's bus, and falsifying time cards, among other reasons.

Respondents moved for dismissal of all of Beyena's claims under rule 12.02(e), and the district court granted the motion.

This appeal follows.

D E C I S I O N

The Record on Appeal

In addressing respondents' motion to dismiss, the district court considered Beyena's complaint, which the court described as short and conclusory, along with a more detailed narrative of his grievances in a memorandum format. A careful review of the district court's order reflects that the court also considered approximately 100 pages of unsworn documents, which are not affixed to an affidavit. Many of these documents are undated and appear to relate to other court cases, Beyena's unemployment-benefits claim, and his EEOC charges. Among the documents is one that the district court explained in its order "dubbed [Beyena] 'the Best Bus Driver Ever.'" These approximately 100 pages of documents are apparently those to which the district court refers in its order when it says: "[Beyena's] pleadings shift from the poetic to the harmlessly vulgar to the offensively sexist, anti-gay, and possibly racist."

On appeal, "Sunburst objects to Beyena's introduction of evidence that is not part of the underlying record." Sunburst claims that "[a]ll of the documents in Beyena's appendix attached to his appellate brief, save for the district court's decision in this case,

were not filed with the district court in the underlying case." Sunburst's objection is both understandable and puzzling. Neither Beyena's 24-page "detailed narrative" nor his approximately 100 pages of documents are file-stamped or listed in the district court's register of actions, notwithstanding the fact that the district court considered the documents as part of Beyena's response to respondents' rule 12.02(e) motion. The record on appeal consists of the "papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any," Minn. R. Civ. App. P. 110.01, but the district court's order clearly reflects that it considered Beyena's documents that Beyena did not file with the district court.

We are left to conclude that the district court allowed Beyena the benefit of every doubt and considerable leeway, as a pro se litigant, considering all of the evidence that Beyena submitted to the court. Yet, the district court did not convert the motion to one for summary judgment thereby allowing respondents an opportunity to respond to Beyena's submissions. On appeal, respondents do not object to the district court's handling of their rule 12.02(e) motion nor does the court's approach appear to have prejudiced Beyena in any way. Although respondents correctly point out that documents contained in Beyena's appendix were not filed in the district court, because the district court clearly considered the documents, we will not ignore them.

Standard of Review

A pleading under rule 12.02(e) may be dismissed "if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn.

2010) (quotation omitted). On appeal from a district court's order dismissing a complaint under rule 12.02(e), this court "review[s] the legal sufficiency of the claim de novo." *Id*. We consider "the complaint in its entirety, including the facts alleged throughout the complaint and the attachments to the complaint." *Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth. of the City of Brainerd*, 821 N.W.2d 184, 192 (Minn. 2012). If "matters outside the pleading are submitted to the district court for consideration and not excluded," the motion to dismiss "shall be treated as a motion for summary judgment and disposed of as provided in [Minnesota Rule of Civil Procedure] 56." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). But we "may consider documents referenced in a *complaint* without converting the motion to dismiss to one for summary judgment." *Id.*

The MHRA generally prohibits an employer from discharging an employee on the basis of the employee's "race, color, creed, religion, national origin, sex, marital status, status with regards to public assistance, membership or activity in a local commission, disability, sexual orientation, or age." Minn. Stat. § 363A.08, subd. 2 (2012). When making a claim under the MHRA, the employee must "present a prima facie case of discrimination by a preponderance of the evidence . . . . This requires [him] to present proof of discriminatory motive." *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986). The employee can show discriminatory motive by direct evidence or by circumstantial evidence under the *McDonnell-Douglas* burden-shifting test. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

Race-Discrimination Claim

Beyena claims that respondents violated the MHRA by discharging him because he is Ethiopian. The district court dismissed this claim, reasoning that Beyena's allegations of discrimination are conclusory and unsupported by facts that link his firing to discrimination and that Beyena did not allege that respondents "expressly discriminated"[1] against him or treated similarly situated non-Ethiopian employees better.

The district court is correct that Beyena has not offered direct evidence of discrimination. Arguably, the name substitution of Tura for Beyena in Sunburst's letter to DEED could be construed as direct evidence of discriminatory motive because of Beyena's allegation that Chew told him that the Sunburst employee who wrote the letter had purposefully substituted the names because she did not like Ethiopians. But Beyena himself refuted that the employee in question had any discriminatory motive. Claims under the MHRA that do "not involv[e] direct evidence of discriminatory animus" are "subject to the three-part burden-shifting framework set forth by the Supreme Court in *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)." *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 918 (Minn. 2012).

Under the *McDonnell-Douglas* burden-shifting test, Beyena must allege sufficient circumstantial facts that, when taken as true, establish that "(1) [he] is a member of a protected class; (2) [he] was qualified for [his] position; (3) [he] was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work." *Id.*

[1] Based on our careful review of the district court's order, we conclude that the court's use of the language, "expressly discriminated," is the equivalent of "directly discriminated."

While Beyena does allege that he is a member of a protected class as an Ethiopian, that he was good at his job, and that he was discharged, he does not allege that after his discharge he was replaced by a nonmember of a protected class, which is a required element under the *McDonnell-Douglass* burden-shifting test to show a prima facie case of discrimination through circumstantial evidence.

We conclude that the district court did not err in dismissing Beyena's racial discrimination claim.

Disability-Discrimination Claim

Beyena seems to allege that, by breaking his elbow, he became disabled, and that Sunburst discharged him because of this disability and therefore violated the MHRA. The district court concluded that Beyena was not disabled within the meaning of the MHRA because he did not suffer from a long-term disability. We agree.

Under the first step of the *McDonnell-Douglas* burden-shifting test for discriminatory discharge, the employee must establish a prima facie case of discrimination by showing that: "(1) [he] is a member of a protected class; (2) [he] was qualified for [his] position; (3) [he] was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work." *Id*. If the employee fails to establish any elements of the prima facie case, "no additional analysis is required and [the employer] is entitled to dismissal of [the employee's] claim as a matter of law." *Goins v. West Grp.*, 635 N.W.2d 717, 724 (Minn. 2001).

To survive respondents' rule 12.02(e) motion, Beyena must allege sufficient facts that, when taken as true, show he was disabled under the MHRA and therefore a member

of a protected class. *Hoover*, 632 N.W.2d at 542; *see also Bahr*, 788 N.W.2d at 81, 84 (rejecting a MHRA-reprisal claim under rule 12.02(e) because the employee failed to establish a prima facie case under the first step of the *McDonnell-Douglas* burden-shifting test).

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." Minn. Stat. § 363A.03, subd. 12 (2012). "[M]ajor life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Gee v. Minn. State Colleges and Univs.*, 700 N.W.2d 548, 553 (Minn. App. 2005) (quotation omitted). While the MHRA does not state how long term an impairment must be to be considered a disability, Minnesota has "sought guidance in the interpretations of federal antidiscrimination statutes when the state law provisions in question are similar to the provisions of the federal statutes." *Id.* (citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 623 (Minn. 1988)); *see also Sigurdson*, 386 N.W.2d at 719 (stating that "[i]n analyzing cases brought under the [MHRA], we have often applied principles developed in adjudication of claims arising under Title VII of the Civil Rights Act of 1964 . . . because of the substantial similarities between the two statutes"). The Eighth Circuit has noted that, under the Americans with Disabilities Act, "temporary impairments with little or no long-term impact are not disabilities." *Samuels v. Kansas City Mo. School Dist.*, 437 F.3d 797, 802 (8th Cir. 2006) (citing 29 C.F.R § 1630.2(j)(2)(ii)–(iii)).

Beyena fell off his bike and broke his elbow. More than five months later, his physician cleared him to return to work without any restrictions. Based on the record, Beyena's short-term injury did not lead to any long-term consequence; therefore, he was not disabled under the MHRA. *See id.* (concluding that employee was not disabled under the ADA when her injury limited her work schedule for approximately six months). Because Beyena was not disabled under the MHRA, even taking all his factual allegations as true, his complaint does not state a disability claim upon which relief can be granted.

We conclude that the district court properly dismissed Beyena's disability-discrimination claim.

Reprisal Claim

Beyena seems to allege in his complaint that Sunburst terminated his employment because he filed a discrimination charge with the EEOC against Sunburst.[2] The district court dismissed Beyena's claim because it was conclusory and unsupported by facts linking his firing to reprisal.

The MHRA reprisal provision states:

> It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a[n] . . . employer . . . to intentionally engage in any reprisal against any person because that person:
>
> (1) opposed a practice forbidden under this chapter . . .
>
> . . . .

[2] Beyena filed his EEOC charge only against Sunburst.

> A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

Minn. Stat. § 363A.15 (2012).

To survive respondents' motion to dismiss under rule 12.02(e), Beyena must allege facts that when taken as true "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). Further, Beyena must plead "sufficient facts to show that it was objectively reasonable for [him] to believe that [respondents'] actions were forbidden by the MHRA." *Id.* at 82. While Beyena need not allege "an actual violation of the MHRA . . . for [his] reprisal claim," he must allege that he had "a good-faith, reasonable belief that the opposed practices were prohibited by the MHRA." *Id.* at 84. If the "practice is not unlawful under the plain terms of the MHRA, [Beyena's] belief that the practice is unlawful cannot be reasonable." *Id.*

Here, Beyena engaged in statutorily protected conduct when he filed his EEOC claim against Sunburst. Minn. Stat. § 316A.15. His charge was based on his belief that Sunburst lowered his hours because he is Ethiopian, a practice unlawful under the MHRA. Minn. Stat. § 363A.08, subd. 2. And Sunburst took adverse employment action

against Beyena by terminating his employment. The question we must address is whether Beyena alleged sufficient facts to create a causal connection between his statutorily protected conduct and Sunburst's adverse employment action.

Respondents terminated Beyena's employment two weeks after he filed his EEOC charge. Generally, . . . more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Hervey v. Cnty. of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008) (quotation omitted). Because the temporal connection between Beyena's protected conduct and Sunburst's termination of his employment is the sole circumstance that supports Beyena's allegation that Sunburst retaliated against him, the district court did not err by dismissing Beyena's retaliation claim. *See Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1044–45 (8th Cir. 2000) (affirming district court's dismissal of employee's retaliation claim because employee had not "raise[d] an inference of causation" merely by showing a temporal connection of 13 days between his protected conduct and his employer's adverse employment action against him).

Intentional Torts

Gambling with Beyena's Personal Injuries

In his complaint, Beyena alleges that respondents engaged in "Intentional Organized games of gambling with plaintiff's personal injuries." We conclude that the district court properly dismissed this claim. The claim does not constitute a tort recognized under Minnesota law, and "[c]reating a new tort is a function properly reserved for the supreme court based upon appropriate facts and record," *Federated Mut.*

Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990), and it is “not the function of this court to establish new causes of actions,” *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 690 (Minn. App. 2010).

Intentional Infliction of Emotional Distress

To sustain a claim of intentional infliction of emotional distress, Beyena must “sustain a . . . heavy burden of production in his allegations regarding the severity of his mental distress” and the “operation of this tort is sharply limited to cases involving particularly egregious facts.” *Hubbard v. United Press Int’l*, 330 N.W.2d 428, 439 (Minn. 1983). Beyena alleges that Sunburst discharged him and substituted another employee’s name for his in a letter. We conclude that the district court properly dismissed this claim because Beyena’s allegations do not meet Beyena’s “heavy burden of production in his allegations.” *Id.*

Fraud

Beyena seems to allege that Chew committed fraud by perjuring himself during the DEED unemployment-benefit hearings. Under Minnesota Rule of Civil Procedure 9.02, a party alleging fraud-related claims must state “the circumstances constituting fraud . . . with particularity.” Beyena does not allege what statements Chew made that were fraudulent, only that Chew generally made fraudulent statements. We conclude that the district court properly dismissed Beyena’s fraud claim because he failed to plead it with particularity.

Defamation

Beyena seems to allege that respondents defamed him, but defamation requires that the defamatory statement be "communicated to someone other than the plaintiff." *Bahr v. Boise Cascade Corp*., 766 N.W.2d 910, 919 (Minn. 2009) (quotation omitted). Beyena does not allege that respondents published defamatory statements to a third party. We conclude that the district court properly dismissed Beyena's defamation claim.

Other Intentional Tort Claims

Beyena's "detailed narrative" contains numerous additional claims, many of which are difficult to comprehend and repetitive. Beyena alleges that respondents committed "Aggravated criminal harassment in the first degree," that they "subjected [Beyena] to Dehumanization's and Humiliations in rape of dignity," that respondents' "action have cost [Beyena] suffer stolen worked 15–20 regular hours every two week pay period and overtimes pay all denied," and that respondents committed "Intentional Orchestrated and Organized criminal actions" and "Intentional invasions of individual rights to privacy" against Beyena. The district court concluded that these claims lacked merit and dismissed them. Beyena does not brief these claims on appeal and therefore waives them. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) (stating that it was "well-established that failure to address an issue in brief constitutes waiver of that issue").

Affirmed.