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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1859**

Trisha Geist-Miller, petitioner,
Appellant

vs.

Ronald Mitchell, et al.,
Respondents.

**Filed August 26, 2008
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Olmsted County District Court
File No. 55-CO-05-2702

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and
Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment dismissing her sexual-harassment and reprisal claims under the Minnesota Human Rights Act. We affirm the district court's decision with respect to appellant's quid-pro-quo theory of sexual harassment and her reprisal claim. But because the legal standard the district court applied to appellant's hostile-work-environment claim is no longer viable following the Minnesota Supreme Court's decision in *Frieler v. Carlson Mktg. Group, Inc.*, ___ N.W.2d ___, 2008 WL 2229478 (Minn. May 30, 2008), we reverse and remand that aspect of the district court's decision for further consideration in accordance with *Frieler*.

FACTS

Appellant Trisha Geist-Miller worked for two companies that were co-owned by respondent Ronald Mitchell and his then-wife: respondent Sun Place Tanning Studios, Inc. (Sun Place Tanning), which owns and operates tanning salons in the Rochester area, and Sun Place, Inc. (Sun Place), which owns and operates tanning salons in the Twin Cities area. Appellant began her employment as a shift manager at a Rochester salon. She then assumed training responsibilities in addition to her shift-manager role. Later, she was promoted to operations manager and then to general manager for both companies. From July 2003 until her discharge from employment, appellant served as general manager for respondent Sun Place Tanning, and as salon manager for one of the Rochester salons.

In 2003, respondent Mitchell entered divorce proceedings. The district court in the divorce proceedings entered a temporary order making respondent Mitchell responsible for the day-to-day management of Sun Place Tanning and his then-wife responsible for Sun Place; each was prohibited from entering the business premises assigned to the other. In response to the court's order, respondent Mitchell required written acknowledgments from managers of respondent Sun Place Tanning that they should make no attempt to contact his then-wife and should advise him if she attempted to contact them. Appellant refused to sign the acknowledgement and was discharged from employment.

Appellant brought suit against respondents, asserting claims for sexual harassment and reprisal. The claims were based on appellant's allegations of multiple incidents of harassment by respondent Mitchell. Appellant further alleged that the reason given for her termination was a pretext for unlawful discrimination and reprisal. Respondents moved for summary judgment, which the district court granted, concluding that appellant lacked proof with respect to an essential element of each of her claims. This appeal follows.

D E C I S I O N

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60,

69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *Id.* at 71 (footnote omitted).

Sexual harassment is expressly recognized as a form of discrimination under the Minnesota Human Rights Act (MHRA). *See* Minn. Stat. § 363A.03, subd. 13 (2006) (“sexual harassment” within the definition of “discriminate”). The MHRA defines sexual harassment to include

unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

- (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . ;
- (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s employment . . . ; or
- (3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

Id., subd. 43 (2006). The conduct described in clauses (1) and (2) has been characterized as “quid pro quo” harassment, while that described in clause (3) is often referenced as “hostile work environment.” *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 480 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). Minnesota courts use the

McDonnell Douglas framework for analyzing MHRA claims at the summary-judgment stage of proceedings. *Id.*; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The prima facie burden varies depending on the category of sexual harassment alleged. *Benassi*, 629 N.W.2d at 480.

For claims of quid-pro-quo harassment, a plaintiff must 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.

Id. at 480-81.

For claims of hostile work environment, a plaintiff must show that “(1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on [sex]; (4) the harassment affected a term, condition or privilege of her employment.” *Frieler*, ___ N.W.2d at ___, 2008 WL 2229478, at *22 n.11. “In order to demonstrate that the harassment affected a term, condition, or privilege of employment, a plaintiff will have to show the harassment was so severe or pervasive as to alter the conditions of the [plaintiff’s] employment and create an abusive working environment” *Id.* (quotation omitted).

Prior to *Frieler*, Minnesota courts required a fifth element of proof in hostile-work-environment cases: that “the employer knew of or should have known of the harassment and failed to take timely and appropriate remedial action.” *Benassi*, 629 N.W.2d at 481; see also *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997). In

Frieler, the Minnesota Supreme Court held that, following a 2001 legislative amendment to the MHRA, this fifth element is no longer required. ___ N.W.2d at ___, 2008 WL 2229478, at *5. Rather, “an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee.” *Id.* at *9. The court further held that, in cases not involving a tangible employment action,

the employer may raise an affirmative defense to liability or damages if it proves by a preponderance of the evidence: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998)).

The district court here based its dismissal of appellant’s sexual-harassment claim on her failure to meet the now-defunct fifth element, concluding that the evidence was insufficient, as a matter of law, to show that respondents knew about the harassment.¹ This basis for dismissal is no longer viable following *Frieler*. Respondents urge that the district court’s decision is alternatively based on its conclusion that the harassment was not severe or pervasive enough to support liability. But we do not read the district court’s decision to reach this issue. Though the district court references the severe-and-pervasive

¹ Appellant challenges the district court’s conclusion that the evidence does not support an inference that respondents knew or should have known about the harassment. In light of *Frieler*, however, we do not reach this issue.

requirement in reciting the applicable legal standards, the court's decision does not address whether that requirement has been met. Because the court's decision with respect to appellant's hostile-work-environment claim is based solely on her failure to meet an element no longer required, we reverse the district court's decision in that respect and remand for further consideration in accordance with *Frieler*.

Appellant asserts that the district court erred by failing to consider her harassment claims under a quid-pro-quo theory. We agree that the district court did not address this theory, but note that appellant's briefing, to both the district court and this court, has not clearly distinguished between the two theories of harassment. The district court understandably may not have realized that appellant was raising a quid-pro-quo claim. Our own review of the evidence makes clear that appellant cannot make the necessary showing to support a quid-pro-quo claim.

Appellant incorrectly characterizes the quid-pro-quo claim as requiring no more than a showing of some harassment. She asserts that the MHRA goes further than federal law in its coverage of sexual harassment, apparently because it textually recognizes a claim for harassment affecting hiring or other employment decisions. *Compare* Minn. Stat. § 363A.03, subd. 13 (defining "discriminate" to include "sexual harassment"), *with* 42 U.S.C. §§ 2000e, 2000e-2 (2000) (prohibiting discrimination based on sex without defining "discriminate" or otherwise textually referencing sexual harassment). But this court has applied these provisions in a manner consistent with the federal courts' jurisprudence addressing quid-pro-quo claims. *See Benassi*, 629 N.W.2d at 480. Under that jurisprudence, it is clear that a quid-pro-quo plaintiff, although she need not show

severe-and-pervasive harassment, does need to show that “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.” *Id.* at 481.

Minnesota courts have not directly addressed the evidence required to make a prima facie showing on this element. In *Benassi*, we focused on the temporal disparity between an alleged vulgar comment and a later salary reduction and then termination of the plaintiff’s employment. *Id.* The federal courts in the Eighth Circuit seem to require the express conditioning of job benefits on the endurance of harassment. Thus, in one case, the Eighth Circuit affirmed dismissal of a quid-pro-quo claim because the defendant “never mentioned [] job status or performance” during the allegedly harassing incidents, nor were his requests to see the plaintiff outside of work “associated . . . in any way with her job.” *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995); *see also Newton v. Cadwell Labs.*, 156 F.3d 880, 883 (8th Cir. 1998) (affirming dismissal of quid-pro-quo claim because plaintiff admitted that defendant never “conditioned her continued employment on submission to his advances”); *Grozdanich v. Leisure Hills Health Ctr, Inc.*, 25 F. Supp. 2d 953, 968 (D. Minn. 1998) (dismissing quid-pro-quo claim because defendant did not make any threats in connection with the harassment). Here, as in the foregoing cases, appellant offers no evidence to connect respondent Mitchell’s inappropriate conduct with any threat to terminate her employment, and thus cannot meet the prima facie test for a quid-pro-quo claim.

Appellant also fails to make a prima facie case of retaliation. Appellant must show that (1) she engaged in statutorily protected conduct; (2) respondents took an adverse employment action; and (3) a causal connection exists between the two. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 548 (Minn. 2001). “[A] causal connection may be demonstrated indirectly 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.” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 445 (Minn. 1983). Appellant suggests that if her sexual-harassment claims survive summary judgment, her reprisal claims necessarily survive as well. We disagree. Reprisal is a separate cause of action that requires proof of an adverse employment action taken because of an employee’s opposition to unlawful conduct. *See Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 182-83 (Minn. App. 2007) (reversing summary judgment with respect to appellant’s sexual-harassment claim but affirming dismissal of reprisal claim based on appellant’s failure to show that she personally made a complaint). Appellant filled out incident reports detailing some of the alleged incidents of harassment, but she cannot remember sharing them with anyone. Moreover, respondent Mitchell and HR employees for the companies deny ever receiving the reports. Absent evidence that the reports were actually communicated, appellant cannot meet the prima facie burden on her reprisal claim.

Even assuming that appellant could make out a prima facie case of quid-pro-quo harassment or reprisal, she would still need to point to evidence supporting a finding of pretext in order to survive summary judgment. Pretext may be shown “either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (quotation omitted). Here, respondents assert that appellant’s employment was terminated because she refused to sign an acknowledgement that was consistent with, although not strictly required by, the court order in the divorce proceedings. It was reasonable under the circumstances for respondent Mitchell to request that managers of Sun Place Tanning not have contact with his then-wife, particularly when the couple had run the businesses together and employees may have felt divided loyalties.

Appellant argues that pretext is evident because she was a good employee and was not terminated on any of the grounds anticipated by her employment agreement; that the court’s order did not actually prohibit contact between her and respondent Mitchell’s then-wife; and that she needed to have contact because she had agreed to continue to help with the Twin Cities locations after stepping down from her general manager position. But none of these facts are probative of pretext because none impugns respondent Mitchell’s expressed belief that the policy change was necessary in light of the divorce proceedings. Particularly in light of the fact that the acknowledgement was required of all managers, appellant has not met her burden to show pretext. *See Meads v. Best Oil Co.*, 725 N.W.2d 538, 542-43 (Minn. App. 2006) (explaining that to show pretext,

employee must do more than show that termination was ill-advised, must show that employer offered “phony excuse”), *review denied* (Minn. Feb. 20, 2007).²

Affirmed in part, reversed in part, and remanded.

² Our conclusion that appellant has not shown pretext with respect to her termination is not fatal to her hostile-work-environment claim, which focuses on conditions during her employment, rather than her termination. Although nominally analyzed under the rubric of the *McDonnell Douglas* test, hostile-work-environment claims do not logically require the demonstration of pretext following the employer’s assertion of a legitimate business reason for the challenged conduct. As one commentator noted, the reason for this departure “is fairly clear—there is never a legitimate reason for harassing an employee, regardless of the employer’s motives.” Elizabeth M. Brama, *Note: The Changing Burden of Employer Liability for Workplace Discrimination*, 83 Minn. L. Rev. 1481, 1490 (May 1999).