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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1911**

Duane Carlson,
Appellant,

vs.

Arrowhead Concrete Works, Inc.,
Respondent.

**Filed August 12, 2008
Affirmed
Harten, Judge***

St. Louis County District Court
File No. 69-C4-04-603216

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Harten, Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant Duane Carlson challenges the summary judgment granted to his former employer, respondent Arrowhead Concrete Works, Inc., dismissing appellant's claims under the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2006) and the Minnesota Occupational Safety and Health Act, Minn. Stat. § 182.654 (2006). Because appellant has not shown genuine fact issues on the elements of a prima facie case for either claim, we affirm.

FACTS

In December 2002, appellant began working for respondent, a supplier of concrete and concrete blocks located in Hermantown. Respondent paid for appellant's training as a pump truck operator, and he began to work in that capacity.

During the summer of 2003, appellant raised several concerns with respondent's management about the safety of various parts of the pump truck. He was dissatisfied with management's responses, and on 28 August 2003, after discussing the situation with his union's business agent, he wrote a letter rescinding his bid to be a pump truck operator. Exercising his seniority rights with respondent, appellant continued to work for respondent in a different capacity until November 2003, when he and six other employees were laid off for the season. Because of a lack of work, respondent did not rehire any of the laid-off employees.

Respondent's collective-bargaining agreement (CBA) with appellant's union provided that employees who were not employed for a year lost their seniority rights. In

November 2004, appellant lost his seniority rights and brought this action, alleging that he was not rehired in violation of the Whistleblower Act and MOSHA.¹ Respondent moved successfully for summary judgment, and appellant challenges that judgment.

DECISION

On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). This court will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. 13 Feb. 1996).

Appellant claims that respondent failed to rehire him because of his complaints about the unsafe condition of his pump truck in violation of the Whistleblower Act and

¹ Respondent removed the matter to federal district court and moved for dismissal on the ground of preemption by section 301 of the Labor-Management Relations Act because appellant had not exhausted the grievance procedure. The motion was denied. *Carlson v. Arrowhead Concrete Works*, 375 F. Supp 2d. 835 (D. Minn. 2005) (remanding matter to state court). Respondent challenged the denial; its appeal was dismissed. *Carlson v. Arrowhead Concrete Works*, 445 F.3d 1046 (8th Cir. 2006) (dismissing appeal for lack of jurisdiction over remand to state court). Respondent again raised the preemption argument in a motion for dismissal in the district court. Concluding that there was no preemption, the district court denied the motion. But, when it considered respondent's motion for summary-judgment motion, the district court revisited the preemption question and concluded that appellant's claims were preempted. Thus, the district court's position on preemption is unclear. In any event, because we affirm the summary judgment on other grounds, we do not address the preemption issue, which is mooted by our affirmance.

MOSHA.² See Minn. Stat. § 181.932, subd. 1 (2006) (“An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee . . . because the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule . . . to an employer or to any governmental body or law enforcement official”); Minn. Stat. § 182.654, subd. 9 (2006) (“No employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted . . . any proceeding or inspection under or related to this chapter [MOSHA]”); *Id.*, subd. 11 (2006) (“An employee acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm to the employee An employer may not discriminate against an employee for a good faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected”).

But we note first that the Whistleblower Act and MOSHA are designed to protect employees and that appellant was not an employee at the time of respondent’s “adverse action,” i.e., not rehiring him after the seasonal layoff. For purposes of the Whistleblower Act, an employee is “a person who performs services for hire in Minnesota for an employer.” Minn. Stat. § 181.931, subd. 2 (2006). For purposes of

² At the summary-judgment hearing, counsel for appellant testified that “[t]he true adverse action, the most adverse action was the failure to recall [appellant] . . . the failure to bring him back [to work].” At oral argument, appellant was represented by different counsel who asserted that the adverse action was the layoff, not the failure to rehire. But a party cannot shift position on appeal, and this court does not generally consider any issues not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

MOSHA, an employee is “any person suffered or permitted to work by an employer.” Minn. Stat. § 182.651, subd. 9 (2006). When appellant was told he would not be rehired, he had neither “perform[ed] services for hire” for respondent for a year nor was he “permitted to work” by respondent. Thus, within the meaning of the statutes, appellant was not an employee at the time of respondent’s alleged adverse action.

A claimant’s status as an employee has been addressed in the context of the Whistleblower Act. *See Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 388-89 (Minn. App. 2003) (affirming dismissal of whistleblower claim based on refusal to rehire because it occurred after employee’s termination and “the whistleblower act only applies to current employees”). Appellant attempts to distinguish *Guercio* on the ground that the employee there had been terminated while appellant had been laid off and his status during his layoff was “ambiguous.” But the employee in *Guercio* was told that, if he turned over a database to the employer, he would be rehired “on the spot”; a few weeks later, he did turn it over, but was not rehired. *Id.* at 383. Thus, there was also ambiguity in the termination in *Guercio*.

Even if appellant were an employee, he failed to show genuine fact issues on the elements of a prima facie claim under the Whistleblower Act or MOSHA. A prima facie case for retaliatory discharge requires: (1) the employee engaged in statutorily-protected conduct; (2) the employer took adverse employment action against the employee; and (3) there was a causal connection between the employee’s conduct and the employer’s adverse action. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

The district court correctly concluded that appellant had not shown any adverse action on the part of respondent.³ The secretary-treasurer of appellant's union testified in a deposition that:

If the company elects . . . [to] lay people off for a year, that's one way they could get rid of people It's never been an issue of the members. It's not been a strike issue. It's not been proposed by the members to change it. That language has been in there [i.e., in the CBA] forever.

Thus, respondent's decision not to rehire appellant after the seasonal layoff was an accepted practice within the industry, provided that respondent did not rehire anyone junior to appellant. It was not an adverse action or a retaliatory action.

Appellant's whistleblower and MOSHA claims fail both because appellant was not an employee within the meaning of the statutes and because he failed to show that respondent took an adverse action against him. Respondent is entitled to summary judgment.

Affirmed.

³ While we agree with the district court's conclusion, we do not agree with its unsupported analysis that the failure to rehire was not an adverse action but an adverse inaction and therefore permissible. Failure to promote and refusal to hire may be adverse employment actions. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 2073 (2002). But this court does not reverse a correct decision because it is based on incorrect reasons. *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987).