STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2183

Philip M. Minell,
Appellant,

vs.

City of Minnetonka,
Respondent.

Filed September 15, 2009
Affirmed in part and remanded
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-07-23138

Brian E. Cote, Cote Law Firm, Ltd., 550A Butler Square, 100 North 6th Street, Minneapolis, MN 55403 (for appellant)

Julie Fleming-Wolfe, 1922 Grand Avenue, St. Paul, MN 55105 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Harten, Judge.*

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

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

HALBROOKS, Judge

Appellant challenges the dismissal of his age-discrimination and reprisal claims on the grounds that (1) the district court erred by failing to address his theory of a hostile work environment based on age; (2) he has produced sufficient direct evidence of age discrimination to survive summary judgment; (3) the district court erred by concluding as a matter of law that he had not been constructively discharged; (4) the district court erred by concluding that he had not presented sufficient evidence to support a prima facie case of reprisal; and (5) the district court erred by concluding that he had not presented sufficient evidence to support a prima facie case of failure to promote. We affirm the dismissal of all of appellant's claims with the exception of the claim of failure to promote, which we remand to the district court for further consideration.

FACTS

Appellant Philip M. Minell alleges that respondent City of Minnetonka (city), his employer of 12 years, illegally discriminated against him based on his age. The city hired appellant in May 1995, when appellant was 42 years old. His initial title was "deputy fire marshal," which was later changed to "fire marshal" to more accurately reflect his job duties. As fire marshal, appellant's duties included code enforcement, public education, firefighting, fire investigation, fire prevention, and training of other firefighters.

Appellant claims that Fire Chief Joseph Wallin frequently made comments and jokes about retirement. At a coworker's retirement party in 2005, Wallin told appellant

that "now my next job in life is to get you to retire." According to appellant, this was said in a "serious tone," but people laughed at it. Wallin also said that "everybody needs help to make that decision," and that as a person gets older, "you need to move on." On several occasions, Wallin asked appellant when he was planning to retire. Wallin ridiculed appellant for not having plans to retire. He also joked with appellant that the first of them to retire had to buy the other a steak dinner. Wallin also stated that appellant would never retire and that the last thing appellant would hear was, "Clear!" Appellant understood this to be a reference to a defibrillator.

Further tension developed between appellant and Wallin in 2006, when appellant was working on two large public-education projects in addition to his usual duties. Appellant claims that Wallin was critical of his work on these projects, berated him, and accused him of being a failure. In the spring or summer of 2006, Wallin directed appellant to work exclusively on public education because the city-wide emergency-preparedness project was the "top priority." Appellant complained to Wallin about this because he did not want to do public education exclusively.

Appellant also became concerned that his employment might be in jeopardy. In the spring of 2006, Wallin told appellant that "you better get your plans in order, because I'm going to work on next year's organizational chart, and I don't see you have a place in it." Appellant understood this to mean that he was not going to have a job for the next year. In March 2006, Wallin changed appellant's work week from four to five days. In October 2006, appellant was prohibited from incurring overtime or comp-time pay. At his deposition, appellant testified that he had asked Wallin if the latter was trying to "get

rid" of him. Wallin responded, "[Y]ou'll know when I'm going to—when I'm trying to get rid of you."

Appellant believed that Wallin wanted to get rid of him so that Kevin Fox, another city employee, could have appellant's position. Fox, who is in his mid-thirties, was promoted to the position of fire marshal in January 2007. According to the city, Fox was promoted to help appellant with inspections so that appellant could "put more time into public education." Both appellant and Fox had the title of "fire marshal."

In March 2007, Fox was promoted to the position of assistant chief of fire prevention. With this promotion, Fox became appellant's supervisor. There was no competitive process conducted by the city for the position. At his deposition, appellant testified that he was qualified for the position that Fox received and that he would have been interested in the position had he been asked.

At his deposition, appellant stated that he thought Wallin was "trying to get rid of me" and "was making my life . . . miserable." Appellant also stated that because of the harassment by Wallin, it was "impossible to work there under him." Appellant testified that he had discussed this with Fox, who told him that "there's nothing you can do to change this. [Wallin] has a problem with you, and I don't know what it is. He wants to see you gone." On another occasion, Fox told appellant: "[Wallin] is bugged by you. There's nothing you do that doesn't bug him. Everything." Fox also said that appellant was "going to be retired or fired."

In May 2007, appellant filed a complaint against Wallin with the city's department of human resources. Appellant alleged that Wallin had violated the city's Respectful

Workplace policy (workplace policy) by, among other things, discriminating against appellant based on age and making inappropriate sexual remarks and jokes. The city conducted an internal investigation of the complaint. Appellant accepted the city's offer of a paid administrative leave during the investigation.

The city found no violations of its workplace policy related to Wallin's alleged discrimination against appellant based on age. But the city did find that "a pervasive, wide-spread pattern of a hostile and offensive work environment" existed in the fire department. The city found that Wallin and senior staff had both "tolerated and participated in this environment, which include[d] discriminatory remarks related to sexual orientation, as well as sexual harassment consisting of unwanted and unwelcome verbal conduct of a sexual nature." The city disciplined each full-time fire-department employee, including Wallin. Appellant was supposed to receive a verbal reprimand for his failure to timely report violations of the workplace policy, but this discipline was not administered because appellant never returned to work.

Appellant was treated for major depression during his paid administrative leave, and his psychologist advised him not to return to work. Appellant's attorney notified the city that appellant wished to take sick leave beginning July 25, 2007—the date that appellant was scheduled to return to work. The city granted appellant a Family and Medical Leave Act (FMLA) leave of absence on July 26, 2007. In an August 13, 2007 letter, the city's human-resources manager clarified that appellant's FMLA leave had started on May 31—the date that appellant was first unable to work—and would end on August 22.

The August 13 letter stated that, before August 18, appellant was required to provide the city with an updated status of his condition and his intent to return to work upon expiration of his FMLA leave. The letter also stated that if appellant was unable to return to work on August 22, the city would process his separation.

On August 17, appellant requested an extended medical leave. The city's Extended Medical Leave policy states, in relevant part:

> An employee may take an unpaid medical leave for a period longer than 12 work weeks in any 12- month period as the result of the employee's serious health condition only upon approval of the Appointing Authority and only for the duration and under such conditions as the Appointing Authority may impose.
>
> The employee must submit the request for this leave in writing, giving the reasons for the request and providing a statement from the employee's doctor indicating a likelihood that the employee can return to work within a reasonable time.

On August 21, 2007, the human-resources manager sent appellant a letter, requesting that he submit the reasons for his extended-medical-leave request in writing and provide a statement from his doctor indicating the date when appellant would be able to return to work. The letter also included the text of the Extended Medical Leave policy.

In a letter dated August 23, appellant's psychologist, Kristen Eide, M.A., L.P., recommended that appellant not return to work "at this time" due to his depression and anxiety. Eide also stated that she was "unable at this time to give a specific date" for appellant's return to work, but that she would "re-evaluate his progress in one month."

On August 24, 2007, city manager John Gunyou sent a letter to appellant that (1) acknowledged receipt of Eide's letter, (2) denied appellant's request for an extended medical leave on the ground that appellant had failed to provide a statement indicating a likelihood that appellant could return to work in a reasonable time, and (3) notified appellant that his last date of employment would be August 24.

In November 2007, appellant filed a civil complaint against the city. Appellant alleged four counts under the Minnesota Human Rights Act (MHRA): (1) age discrimination, (2) age harassment, (3) sexual harassment, and (4) reprisal. Appellant also alleged that the city constructively discharged him and created a hostile work environment. The city moved for summary judgment. The district court granted the city's motion on all counts and dismissed appellant's complaint with prejudice. 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, 76–77 (Minn. 2002). Summary judgment is appropriate if an employee fails to present a prima facie case of employment discrimination under the MHRA. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 482 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001).

Under the MHRA, an employer may not "discharge an employee" or "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of age. Minn. Stat.

§ 363A.08, subd. 2 (2008). To establish age discrimination, a plaintiff may put forth direct evidence of discrimination or circumstantial evidence through the *McDonnell Douglas* burden-shifting test. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25 (1973)). 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).

Appellant does not challenge the dismissal of his sexual-harassment claim. We address each of his remaining claims in turn.

I.

Appellant argues that he has established a claim of age harassment under the MHRA.[1] We disagree.

The elements of a prima facie case of hostile work environment are: (1) plaintiff is a member of a protected class; (2) plaintiff was subjected to unwelcome harassment; (3) the conduct was based on plaintiff's membership in a protected group; and (4) the conduct affected a term, condition, or privilege of plaintiff's employment. *Frieler v.*

[1] While "sexual harassment" is expressly recognized by the MHRA, Minn. Stat. § 363A.03, subds. 13, 43 (2008), the MHRA makes no mention of any other form of harassment. But the MHRA's prohibitions on discrimination have been interpreted to prohibit harassment that creates a hostile work environment in contexts other than sexual discrimination. *See, e.g.*, *Williams v. Metro. Waste Control Comm'n*, 781 F. Supp. 1424, 1426 (D. Minn. 1992) (racial harassment); *Wenigar v. Johnson*, 712 N.W.2d 190, 205–07 (Minn. App. 2006) (disability harassment). We therefore address the merits of appellant's hostile-work-environment claim based on age discrimination.

Carlson Mktg. Group, Inc., 751 N.W.2d 558, 571 n.11 (Minn. 2008). But even assuming that appellant has established a prima facie case of a hostile work environment based on age, we conclude that the city has demonstrated its entitlement to the *Ellerth–Faragher* affirmative defense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

The Minnesota Supreme Court has held:

> In circumstances when no tangible employment action is taken against the employee, 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 . . . 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."

Frieler, 751 N.W.2d at 570-71 (quoting *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. 2270).

Appellant argues that the *Ellerth–Faragher* defense cannot be asserted by the city because appellant has suffered a tangible employment action. *See id.* at 571 ("[A]n employer may not avail itself of this affirmative defense when the supervisor harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." (quotation omitted)). First, appellant claims that his constructive discharge constitutes a tangible employment action. But, as addressed below, we conclude that appellant was not constructively discharged.

Second, appellant contends that Wallin undesirably reassigned him by restricting his job duties to public education. But it is undisputed that public education was a

legitimate employment duty for a fire marshal. We therefore conclude that appellant was not undesirably reassigned.

Third, appellant argues that his actual discharge in August 2007 constituted a tangible employment action. Appellant is correct that actual discharge constitutes a tangible employment action. *See id.* But the *Ellerth–Faragher* affirmative defense is still available to an employer when an employee fails to present sufficient evidence of a causal link between the adverse tangible employment action and the alleged harassment. *See, e.g., Ferraro v. Kellwood Co.*, 440 F.3d 96, 101–02 (2d Cir. 2006); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 962–63 (9th Cir. 2004); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313, 1316-17 (11th Cir. 2001); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 119-20 (3d Cir. 1999), *as amended* (3d Cir. May 11, 1999); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998); *Newton v. Cadwell Labs.*, 156 F.3d 880, 883–84 (8th Cir. 1998). Here, there is no evidence that Wallin was involved in the decision to discharge appellant.

Appellant also argues that the city has failed to establish the first element of the *Ellerth–Faragher* affirmative defense—specifically, appellant contends that the city has taken insufficient corrective action.[2] But appellant cannot claim that the city's corrective actions were ineffective or that the harassment continued after appellant's complaint because he never returned to work after making the complaint. *See Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007) (concluding that city had satisfied first element

[2] Appellant does not appear to contest the district court's conclusion that the second element of the *Ellerth–Faragher* affirmative defense is satisfied. We therefore do not address this issue on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

of *Ellerth–Faragher* defense as a matter of law "because it had a facially valid antiharassment policy that, when invoked by Plaintiffs, brought an immediate end to [the] harassment"); *McCurdy v. Ark. State Police*, 375 F.3d 762, 770–71 (8th Cir. 2004) (concluding that police department promptly corrected harassing behavior when it was "indisputable that [plaintiff] suffered absolutely no harassment . . . after she complained").

We therefore conclude that the city is entitled to the *Ellerth–Faragher* affirmative defense, precluding appellant's hostile-work-environment claim.

II.

Appellant argues that he has provided sufficient direct evidence of age discrimination to survive summary judgment. "[D]irect evidence is evidence showing 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). "Stray remarks made in the workplace cannot serve as direct evidence of discrimination." *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997).

Appellant contends that the following examples constitute direct evidence of age animus: Wallin's repeated inquiries and jokes about retirement and appellant's age; Wallin's threatening appellant's job; Wallin's hostility toward appellant; and Wallin's involvement in Fox's promotions. We disagree. Adverse employment actions are those that have "some materially adverse impact on [the employee's] employment." *Coffman*

v. Tracker Marine, L.P., 141 F.3d 1241, 1245 (8th Cir. 1998). "[M]ere inconvenience or unhappiness on the part of the employee will not lead to a finding of actionable adverse employment action." *Ludwig v. Nw. Airlines, Inc.*, 98 F. Supp. 2d 1057, 1069 (D. Minn. 2000). Wallin's inquiries, jokes, hostility, and even his statements concerning appellant's continued employment do not rise to the level of materially adverse impacts upon appellant's employment. And appellant cites no caselaw to support the proposition that Fox's promotions constitute adverse employment action against appellant. Appellant has therefore failed to present sufficient direct evidence of age discrimination for this claim to survive summary judgment.

III.

Appellant argues that he was constructively discharged as a matter of law. We disagree. "[C]onstructive discharge occurs when an employee resigns in order to escape intolerable working conditions." *Navarre v. S. Wash. County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002) (quotation omitted). To establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to resign or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412–13 (Minn. App. 1995).

The record is clear that appellant did not quit. He was discharged. *See Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 574-75 (8th Cir. 1997). Appellant concedes that he did not quit and cites *White v. Honeywell, Inc.*, 141 F.3d 1270 (8th Cir. 1998), for the proposition that constructive discharge is established if the

employee can show that intolerable working conditions forced the employee into a medical leave of absence. In *White*, the Eighth Circuit determined that an employee who had been forced into a medical leave of absence was "in no better position than one who was forced to quit as a result of objectively intolerable conditions" and did not need to prove that she "technically 'quit.'" 141 F.3d at 1279. But the employee in *White* had been placed on medical leave and was still on medical leave at the time of trial. Unlike appellant, she was not actually discharged. *See id.* at 1273–74. Appellant's reliance on *White* is therefore misplaced.

We conclude that appellant's constructive-discharge claim fails as a matter of law.

IV.

Appellant argues that his discharge was an illegal reprisal in response to his complaint to human resources. We disagree. The MHRA prohibits reprisal against an employee who has filed a complaint about an unfair, discriminatory practice. Minn. Stat. § 363A.15 (2008); *Bahr v. Capella Univ.*, 765 N.W.2d 428, 433 (Minn. App. 2009), *review granted* (Minn. Aug. 11, 2009). A plaintiff may establish reprisal either by offering direct evidence of reprisal or by establishing an inference of reprisal under the *McDonnell Douglas* burden-shifting framework. *Fletcher*, 589 N.W.2d at 101. Under the burden-shifting framework, a plaintiff must first establish a prima facie case for retaliatory dismissal, which consists of (1) statutorily protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the protected conduct and the adverse action. *Hoover*, 632 N.W.2d at 548; *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). After the plaintiff

establishes a prima facie case, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the challenged employment action. *Hoover*, 632 N.W.2d at 548–49. Then, the plaintiff must show that the employer's articulated reason is a pretext for retaliation. *Id.* at 549.

A. Prima facie case

It is undisputed that the first two elements of a prima facie case of reprisal are met here. At issue is the third element: the causal connection between appellant's May 25, 2007 complaint and his August 24, 2007 discharge. "[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*, 330 N.W.2d at 445. It is undisputed that the city was aware of appellant's complaint to human resources. It is also undisputed that appellant was discharged three months after his complaint. *See Thompson v. Campbell*, 845 F. Supp. 665, 675 (D. Minn. 1994) (concluding that a causal connection is not precluded when an adverse employment action occurs four months after the protected activity). Appellant has therefore established a prima facie case of reprisal.

B. Legitimate reason for challenged employment action

The city has articulated a legitimate, nonretaliatory reason for discharging appellant: appellant failed to comply with the city's Extended Medical Leave policy and appellant was unable to return to work.

C. Pretext

Although temporal proximity may be sufficient to satisfy the causal-connection element, it is not sufficient to prove pretext. *Hubbard*, 330 N.W.2d at 445–46. 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). Pretext can also be established by showing that "the employer acted on impulse, in response to a charge or complaint." *Hubbard*, 330 N.W.2d at 446. The employee must show that the employer offered a "phony excuse." *Meads v. Best Oil Co.*, 725 N.W.2d 538, 542–43 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Feb. 20, 2007); *see also Hoover*, 632 N.W.2d at 546 (stating that judgment as a matter of law is appropriate under *McDonnell Douglas* "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no [retaliation] had occurred" (quotation omitted)).

Appellant makes several arguments attacking the city's proffered reason for terminating his employment. First, appellant argues that Wallin was involved in the discharge decision. But appellant does not cite any evidence that would support this assertion. Appellant merely states that (1) city manager Gunyou "asked Wallin if [appellant] was eligible for retirement" and (2) "the City was involved in long-term succession planning (albeit undocumented) to confront the looming bubble of retirements in the next 5–10 years." Appellant appears to be referring to two statements that Gunyou

made at his deposition. But both of these statements were made regarding the promotion of Fox, not the later discharge of appellant. They do not support appellant's theory that Wallin was involved in the discharge decision. Appellant also states that Gunyou approved of Fox's promotion. It is not clear how this shows pretext for the discharge decision.

Second, appellant claims that the city's Extended Medical Leave policy contains ambiguous terms, such as "likelihood" and "reasonable time." Appellant's argument seems to be that Eide's August 23, 2007 letter satisfies the policy's requirement that appellant provide a statement from his doctor "indicating a likelihood that the employee can return to work within a reasonable time." Appellant's argument is unconvincing because Eide explicitly declined to give any date whatsoever for appellant's return to work.

Third, appellant argues that the city's Extended Medical Leave policy did not require his discharge. Appellant claims to have accumulated more than 200 hours of leave and argues that he could have used these hours pending his doctor's re-evaluation of his ability to return to work.[3] Appellant's argument that the city was not required to discharge him is flawed because it assumes that he would have been able to return to work upon the exhaustion of his remaining vacation hours. But there is no evidence in the record that appellant would ever have been able to resume his employment duties.

[3] Appellant appears to be mistaken that he had accumulated more than 200 hours of sick leave. Appellant's final paycheck indicates that appellant had exhausted his sick time during his FMLA absence, leaving appellant with 204.88 hours of *vacation* time when he was discharged.

Appellant's argument ignores that he had exhausted his FMLA leave, had not complied with the procedure for requesting an extended medical leave, and was unable to return to work upon the expiration of his FMLA leave. It is not clear what option the city had other than to terminate appellant's employment.

Finally, appellant argues that his complaint to human resources "alleged facts that were scandalous and reflected badly on City management, especially with its 'shared values' policy." But this is something that would be true in any situation involving a complaint to human resources. Appellant cites no evidence to support his speculation that anyone in city management wanted to discharge him or was angry or embarrassed by his human-resources complaint. Additionally, appellant's complaint focused exclusively on Wallin, not city management.

Appellant has produced no evidence beyond mere speculation to show that the city's articulated reason for his discharge was a pretext for retaliation.

V.

Appellant argues that the city discriminated against him under a failure-to-promote theory. Although appellant's claim of failure to promote based on age was not pleaded in the complaint or the amended complaint, the district court specifically addressed this claim. We therefore consider the claim on its merits.

The MHRA provides that a failure to promote is a discrete act of discrimination. *Mems v. City of St. Paul*, 327 F.3d 771, 785 (8th Cir. 2003). The elements of a prima facie case of discriminatory failure to promote are: (1) plaintiff is a member of a protected group; (2) plaintiff was qualified and applied for a promotion to a position for

which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) other employees of similar qualifications who were not members of a protected group were promoted at the same time plaintiff's request for a promotion was denied. *Lyoch v. Anheuser-Busch Cos.*, 139 F.3d 612, 614 (8th Cir. 1998) (analyzing Title VII claim). It is undisputed that plaintiff is a member of a protected group. It is also undisputed that Fox, who is younger than appellant, was selected for promotion.

Appellant concedes that he did not apply for the promotion to assistant fire chief that Fox received in March 2007. But

> formal application will not be required to establish a prima facie case if the job opening was not officially posted or advertised and either (1) the plaintiff had no knowledge of the job from other sources until it was filled, or (2) the employer was aware of the plaintiff's interest in the job notwithstanding the plaintiff's failure to make a formal application.

Chambers v. Wynne Sch. Dist., 909 F.2d 1214, 1217 (8th Cir. 1990); *see also Lyoch*, 139 F.3d at 615 ("[A] plaintiff alleging a prima facie case of failure to promote should not bear the same burden when the criteria are subjective and the process vague and secretive as when the case involves objective hiring criteria applied to all applicants." (quotations omitted)). Here, it is uncontested that there was no competitive process for the assistant-fire-chief position. Appellant testified at his deposition that in the "middle of [his] career" he had expressed interest in becoming an assistant fire chief to Wallin and had applied for an assistant-fire-chief position in 2005. There is no evidence that appellant was informed of the assistant-fire-chief position until Wallin decided to promote Fox.

We therefore conclude that appellant has established a prima facie case of failure to promote.

Under the burden-shifting framework of *McDonnell Douglas*, the city then has the burden to provide a legitimate, nondiscriminatory reason for its decisions to promote Fox and not to announce the position to appellant. *See McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. The city proffers several reasons for its promotion of Fox to the position of fire marshal, but offers no reason for its promotion of Fox from fire marshal to assistant fire chief or for its decision to bypass the competitive application process. Nor does either party address the next step of the *McDonnell Douglas* framework—that is, whether appellant has shown that any proffered reason was a pretext for age discrimination. *See id.* at 804, 93 S. Ct. at 1825.

Because appellant has established a prima facie case of failure to promote, and because we are unable, on this record, to discern a legitimate reason for the city's decisions to promote Fox and not to announce the position to appellant,[4] we remand this claim to the district court for a consideration of the city's motivations in accordance with the burden-shifting framework of *McDonnell Douglas*. Upon remand, the district court is not precluded from reopening the record to receive additional evidence.

Affirmed in part and remanded.

[4] We do not imply that the city singled out appellant when it decided to bypass the competitive application process; there is no evidence that the assistant-fire-chief position was announced to anyone.