STATE OF MINNESOTA
IN COURT OF APPEALS
A10-676

Janis E. Nelson,
Respondent,

vs.

County of St. Louis, as owner and operator of
Chris Jensen Health and Rehabilitation Center, et al.,
Appellants.

Filed February 8, 2011
Affirmed in part, reversed in part, and remanded
Wright, Judge

St. Louis County District Court
File No. 69DU-CV-07-2746

Frank Yetka, William Helwig, Rudy, Gassert, Yetka & Pritchett, P.A., Cloquet, Minnesota (for respondent)

Mark Rubin, St. Louis County Attorney, Janilyn K. Murtha, Assistant St. Louis County Attorney, Duluth, Minnesota (for appellants County of St. Louis, Debra Switzer)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Stauber, Judge.

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

WRIGHT, Judge

Appellants St. Louis County and Debra Switzer challenge the district court's judgment in favor of respondent Janis Nelson for appellants' violations of the Minnesota

Human Rights Act (MHRA), Minn. Stat. §§ 363A.001-363A.43 (2010),[1] and the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2010). The county and Switzer argue that the district court erred by (1) determining liability under both the MHRA and the Whistleblower Act in violation of the exclusivity provision of the MHRA, (2) concluding that Nelson's reports of maltreatment of a vulnerable adult are protected conduct under the Whistleblower Act, (3) awarding attorney fees without applying a lodestar analysis or making the requisite factual findings, (4) concluding that Switzer is not entitled to official immunity, and (5) denying their motion for a new trial. By notice of related appeal, Nelson seeks reversal of the district court's posttrial decision to deny the punitive-damages award. We affirm in part, reverse in part, and remand.

FACTS

Nelson is a registered nurse who has been employed by St. Louis County since 1978. During her employment, she has held nursing and supervisory positions at several facilities. Nelson began working as a unit supervisor at the Chris Jensen Health and Rehabilitation Center (center) in approximately December 2002.

In February or March 2003, Nelson filed a vulnerable-adult report with Switzer, the head of the department in which Nelson worked, expressing concerns about the care provided to a resident of the center. Following an investigation, the Office of Health

[1] Because the 2010 version of the applicable statutes does not change or alter the rights of the parties, the 2010 version of these statutes will be referred to throughout this analysis. *See McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986) (indicating that current version of statute will be used unless it changes or alters matured or unconditional right of parties or creates other injustice), *review denied* (Minn. Nov. 17, 1986).

Facility Complaints issued a report in March 2004 finding that neglect had occurred but that the center had taken corrective action.

During the following summer, when staff workloads at the center were adjusted, Nelson's workload was increased significantly. She had difficulty completing her work after the change. Following the standard procedure, Nelson reported her difficulty with her workload to a supervisor. She also reported the workload problem to her union, ASFCME Council 5, and requested the union's assistance. Nelson's supervisor at that time was a male employee whose conduct caused Nelson to file a gender-harassment grievance with her union in July 2004. For several months following the grievance, Nelson's supervisor continued to harass her. During the same period, Nelson began to experience depression and anxiety about her work environment. In August 2004, Nelson's workload was reduced. In November 2004, following an investigation conducted by the county's employee relations department, the county concluded that the gender-harassment grievance was unfounded. But some "administrative concerns" were identified. One week after she learned the results of the gender-harassment investigation, Nelson took a medical leave that lasted from November 2004 until March 2005.

Nelson returned to work as a weekend part-time nurse supervisor. On March 27, 2005, Nelson made an oral vulnerable-adult report to the director of nursing relating to the medical care provided to a patient during the shift before Nelson's. On May 5, the director of nursing placed Nelson on a paid suspension pending an investigation of the March 2005 incident. Because she was not notified that the center had reported the March 2005 incident to the proper authorities as required, Nelson submitted a formal

vulnerable-adult report on May 9. Following an investigation conducted by the director of nursing, Nelson was suspended on May 18 for two months without pay because of the March 2005 incident. No action was taken with respect to other employees who were involved in the March 2005 incident. Nelson filed a union grievance regarding the suspension. An arbitrator found just cause to discipline Nelson based on her involvement in the March 2005 incident. But the arbitrator reduced the length of the suspension.

Nelson returned to work in July 2005. In August 2005, Nelson filed gender-discrimination and reprisal charges with the Minnesota Department of Human Rights regarding the center's response to her gender-harassment complaint. The center received notice of the charges on or before September 6, 2005.

On September 10, 2005, Nelson was implicated in another incident involving a patient at the center. Following an investigation by the director of nursing, Nelson's employment was terminated. Another supervisor who was directly involved in the September 2005 incident was not disciplined. Nelson filed a union grievance regarding the termination of her employment. An arbitrator found that the termination of Nelson's employment was not warranted by the September 10 incident and reduced Nelson's discipline to an unpaid suspension for the duration of the arbitration process, a period of almost three years. In March 2006, Nelson filed another complaint with the Minnesota Department of Human Rights, alleging reprisals by the center for the gender-discrimination and reprisal charges filed in August 2005. Nine days after Nelson filed the second complaint, employees of the center placed negative employee evaluations for

2004 and 2005 in Nelson's personnel file and sent the negative evaluations to the Board of Nursing.

Nelson commenced this action against the county and Switzer in September 2007, alleging reprisal under the MHRA, Minn. Stat. §§ 363A.001-363A.43, defamation, retaliation under the Whistleblower Act, Minn. Stat. § 181.932, negligent infliction of emotional distress, intentional infliction of emotional distress, and multiple violations of the Minnesota Data Practices Act, Minn. Stat. §§ 13.01-13.99 (2010). The district court granted summary judgment in favor of the county and Switzer on the defamation, negligent and intentional infliction of emotional distress, and Minnesota Data Practices Act claims. The district court denied summary judgment on the MHRA and Whistleblower Act claims.

Following a bench trial, the district court ordered judgment in favor of Nelson on the MHRA and Whistleblower Act claims, concluding that (1) based on her gender-discrimination and vulnerable-adult complaints, Nelson was a protected person under the MHRA and the Whistleblower Act; (2) Nelson established a causal link between the county's attempted termination of her employment and the gender-discrimination complaints and vulnerable-adult reports that she made; (3) the county's and Switzer's explanation of the discipline imposed on Nelson was pretextual; and (4) the county and Switzer were not immune from suit because their conduct was willful and intentional. The district court awarded Nelson $101,567.41 in compensatory and punitive damages and attorney fees. In its ruling on posttrial motions, the district court denied the county's

and Switzer's motions for a new trial but reduced the damages award by excluding the punitive-damages award of $8,500. This appeal followed.

D E C I S I O N

I.

The county and Switzer challenge the district court's judgment in favor of Nelson for violating the MHRA and the Whistleblower Act on two grounds. First, they argue that the district court's decision violates the MHRA's exclusivity provision because Nelson alleged the same injury as the basis for recovery under both statutes. Second, they contend that making vulnerable-adult reports is not protected conduct under the Whistleblower Act. We address each argument in turn.

A.

Whether the exclusivity provision of the MHRA precludes Nelson's recovery under the Whistleblower Act presents a question of statutory interpretation, which we review de novo. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 613 (Minn. 2008). The MHRA prohibits reprisal by an employer against a person who initiates or participates in any proceeding commenced under the MHRA. Minn. Stat. § 363A.15; *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 485 (Minn. 1996). The exclusivity provision of the MHRA provides that, "as to acts declared unfair by [the MHRA], the procedure herein provided shall, while pending, be exclusive." Minn. Stat. § 363A.04. Addressing the scope of the exclusivity provision, the Minnesota Supreme Court reasoned in *Williams* that "the legislature could not have contemplated that employees seeking redress for allegedly discriminatory employment action [under the MHRA] could

simultaneously maintain an action [under the Whistleblower Act] relating to the same allegedly discriminatory practice and predicated on identical factual statements and alleging the same injury or damages." 551 N.W.2d at 485.

Although Nelson alleged the same injury—the termination of her employment—in both the MHRA and the Whistleblower Act claims, the claims differ in their factual bases and the nature of the discriminatory practice underlying each allegation. With respect to the Whistleblower Act claim, Nelson alleged that her employment was terminated because she filed multiple vulnerable-adult reports. The discriminatory practice underlying this claim was retaliation for filing these reports. With respect to the MHRA claim, Nelson alleged that her employment was terminated because she filed a gender-discrimination complaint arising from her supervisor's harassment. The discriminatory practice underlying this claim was termination in reprisal for reporting the gender discrimination. Although alleging the same injury—employment termination—Nelson's claims neither relate to the same discriminatory practice nor are predicated on identical factual statements. Therefore, because the MHRA's exclusivity provision does not bar Nelson's recovery under the Whistleblower Act for retaliation in response to her vulnerable-adult reports, the district court did not err by awarding judgment and damages on both grounds.

B.

The county and Switzer also argue that the district court erred when it determined that filing vulnerable-adult reports within the course of one's job duties is protected conduct under the Whistleblower Act. Whether an employee's actions are protected

conduct under the Whistleblower Act presents a question of law, which we review de novo. *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 226 (Minn. 2010) (plurality opinion).

Under the Whistleblower Act, 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 adopted pursuant to law to an employer or to any governmental body." Minn. Stat. § 181.932, subd. 1. To establish a prima facie case, an employee must "demonstrate statutorily protected conduct by the employee, an adverse employment action by the employer, and a causal connection between the two." *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005).

The district court found that Nelson reported suspected violations of law to an outside agency in good faith when Nelson made a vulnerable-adult report in 2003 and two vulnerable-adult reports concerning the March 2005 incident. Such acts, the district court concluded, are protected conduct under the Whistleblower Act. The county and Switzer argue that Nelson cannot recover under the Whistleblower Act because she made the vulnerable-adult reports in the course of her job duties, which is beyond the scope of protected conduct under the Whistleblower Act.

The Minnesota Supreme Court recently rejected a per se job-duties exception to the Whistleblower Act. *Kidwell*, 784 N.W.2d at 227. But an employee's job duties may be relevant to determining whether an employee's reports constitute statutorily protected conduct. *Id.* When assessing whether statutorily protected conduct is implicated, the employee's purpose in making the report must be considered. *Id.* If the report is made

"for the purpose of blowing the whistle, i.e. to expose an illegality," the employee's conduct is statutorily protected. *Id.* (quotation omitted). That an employee's job duties include reporting wrongdoing does not preclude a Whistleblower Act claim as a matter of law; but an employee whose job duties include investigating and reporting wrongdoing must establish "something more than the report itself" to show that the conduct is protected. *Id.* at 228. One relevant consideration in our analysis is the nature of the employment obligation. *Id.* at 229. When an employee has a general obligation to report wrongdoing, but such investigation and reporting is not within the employee's specifically assigned job duties, a report to expose wrongful acts can be protected conduct. *Id.* ("[A] reasonable fact-finder could, depending on the evidence, infer that an employee who makes a report based on an employment-related obligation, but not as part of an assigned job duty, was doing so in order to expose an illegality.").

The district court found that filing vulnerable-adult reports was not within Nelson's regular job duties. But Nelson was required by state law to assist the state in protecting vulnerable adults. As a registered nurse, Nelson is a mandated reporter under the vulnerable-adult statute who must report alleged or suspected maltreatment of vulnerable adults. *See* Minn. Stat. § 626.5572, subd. 16 (2010) (defining "mandated reporter" as a professional or professional's delegate who cares for vulnerable adults or provides services in a hospital or other facility licensed to serve adults). The vulnerable-adult statute specifically contemplates a Whistleblower Act claim for retaliation resulting from making a vulnerable-adult report without distinction as to mandated reporters. *See* Minn. Stat. § 626.557, subd. 17(b) (2010) ("In addition to any remedies allowed under

[the Whistleblower Act], any facility or person which retaliates against any person because of a report of suspected maltreatment is liable to that person for actual damages, punitive damages up to $10,000, and attorney fees."). The district court correctly determined that Nelson's obligation to make a vulnerable-adult report was an "employment-related obligation" rather than "an assigned job duty." *See Kidwell*, 784 N.W.2d at 229. The purpose of Nelson's vulnerable-adult reports was to expose suspected maltreatment of a patient as contemplated by the Whistleblower Act.

The county and Switzer also argue that Nelson's reporting was not statutorily protected conduct because the reports addressed a concern about "compliance." But the district court's findings indicate that the incidents that prompted Nelson's vulnerable-adult reports involved substandard patient care, which led to a formal investigation. The investigation found that harm consistent with patient neglect occurred. Thus, this argument advanced by the county and Switzer is unavailing.

The county and Switzer also contend that the district court's failure to make a finding as to the purpose of Nelson's report precludes a determination that her actions are protected conduct. We disagree. "To qualify as a report under the statute, a report must 'blow the whistle' by notifying the employer of a violation of law that is a clearly mandated public policy." *Cokley v. City of Otsego*, 623 N.W.2d 625, 631 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). Although the district court did not expressly find that Nelson made reports for the purpose of exposing a violation of the law, the district court described Nelson's April 2003 report as a report "regarding treatment of patients" and her March 2005 report as one "based on the care and treatment provided

during the shift prior to [Nelson's]." These findings, together with the district court's findings about the nature of the incidents themselves, more than adequately support the district court's finding that Nelson's reports relate to protected conduct under the Whistleblower Act.

II.

The county and Switzer challenge the attorney-fee award, arguing that the district court erred by failing to apply the lodestar method and make specific factual findings on the calculations of the attorney-fee award. We review a district court's award of attorney fees for an abuse of discretion. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 596 (Minn. App. 1994).

Both the MHRA and the Whistleblower Act authorize an award of reasonable attorney fees. Minn. Stat. § 363A.33, subd. 7 (MHRA); Minn. Stat. § 181.935(a) (2010). Moreover, when a successful Whistleblower Act claim is based on a vulnerable-adult report, attorney fees are mandatory. Minn. Stat. § 626.557 subd. 17(b). Minnesota has adopted the federal lodestar analysis for calculating attorney fees. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 & n.9 (Minn. 1988) (applying *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983)). First, the district court determines the "lodestar" figure by "multiplying the 'number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.'" *Id.* (quoting *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939). The district court next excludes any hours that were not reasonably expended, such as those that are redundant, excessive, or unnecessary. *Id.* at 629; *Hensley*, 461 U.S. at 433-34, 103 S. Ct. at 1939-40. The district court then determines

whether any other factors justify a departure from the requested amount. *Hensley*, 461 U.S. at 434, 103 S. Ct. at 1940. Because a plaintiff is not entitled to attorney fees for hours expended on claims for which the plaintiff did not obtain relief, reasonable attorney fees are calculated only as to those claims on which the plaintiff prevailed. *Id.* at 434-35, 103 S. Ct. at 1940. The district court must provide a "'concise but clear explanation of its reasons for the fee award'" and its reasons for accepting or rejecting the request. *Anderson*, 417 N.W.2d at 629-30 (quoting *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941).

The district court initially awarded Nelson $55,500 in attorney fees, an amount that is approximately equal to Nelson's damages and is approximately 75 percent of Nelson's attorney-fee request of $74,281.30. But the district court did not explain its rationale for the attorney-fee award in its initial order. The district court determined that the hours expended and rates charged were reasonable in light of the nature and complexity of the case, and it found that the amount of the award is supported by the evidence.

The county and Switzer contend that the district court did not employ the lodestar method because it failed to exclude fees expended on unsuccessful claims and duplicative and unrelated expenses. This argument is without evidentiary support. The district court's attorney-fee award and factual findings reflect proper consideration of the factors set forth in *Anderson* and *Hensley*. The bulk of the expenses that the county and Switzer challenge—such as for duplicative work, transportation costs, and fees related to arbitration and union disputes that are unrelated to the claims on which Nelson prevailed—cumulatively are less than 25 percent of Nelson's original attorney-fee

request. And although several of Nelson's claims were dismissed on summary judgment, Nelson prevailed on both of the issues that went to trial, which is a costlier proceeding. We conclude from our careful review that the district court's attorney-fee award comports with the lodestar analysis and is reasonable.

III.

The county and Switzer argue that Switzer is entitled to official immunity and that the district court's findings do not support its ruling to the contrary. Whether the doctrine of official immunity applies presents a legal question, which we review de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996). Official immunity protects government employees who may be subject to liability arising from the performance of their duties. *Davis v. Hennepin Cnty.*, 559 N.W.2d 117, 122 (Minn. App. 1997), *review denied* (Minn. May 20, 1997). "[A] public official charged by law with duties which call for the exercise of . . . judgment or discretion is not personally liable to an individual for damages unless [the official] is guilty of a willful or malicious wrong." *State ex rel. Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 569 (Minn. 1994) (quoting *Elwood v. Rice Cnty.*, 423 N.W.2d 671, 677 (Minn. 1988)). To determine whether a public official committed a willful or malicious wrong requires an "objective inquiry into the legal reasonableness of an official's actions." *Id.* When conducting this inquiry, we consider whether the official intentionally committed an act that he or she had reason to believe is prohibited. *Id.*

Official immunity may be asserted as a defense against MHRA and Whistleblower Act claims. *Id.* (MHRA); *Burns v. State*, 570 N.W.2d 17, 20 (Minn. App. 1997)

(Whistleblower Act). But conduct that violates the MHRA or Whistleblower Act ordinarily constitutes willful or malicious conduct that precludes official immunity. *See Beaulieu*, 518 N.W.2d at 571 ("We believe there are few circumstances where a public official might be deemed to have committed a discriminatory act under Minn. Stat. § 363.03, subd. 4, [MHRA], and yet be deemed not to have committed a malicious or willful wrong under the principally objective standard [for official immunity] . . . ."); *see also Burns*, 570 N.W.2d at 20 ("We follow the analysis used by the supreme court in *Beaulieu* and anticipate few circumstances where a public official would violate the Whistleblower Act without committing a malicious or willful wrong.").

The district court concluded that Switzer is not entitled to official immunity from liability for her "willful and intentional conduct . . . in relation to the Human Rights and Whistleblower Acts." Our independent review leads us to conclude that there is ample evidentiary support for this determination. The district court found that Nelson was terminated in reprisal for her gender-discrimination complaints and vulnerable-adult reports. The district court also determined that the negative employment evaluations for prior years created shortly after Nelson filed an MHRA complaint in 2006 evince the administration's "knowledge . . . that they were on thin ice." And the explanations that Switzer and the county offered for the disparate treatment of Nelson were found to be neither reasonable nor credible by the district court. In its amended order, the district court addressed additional evidence establishing that Switzer was directly involved in filing Nelson's negative employee evaluations in March 2006 and that it was Switzer's decision to terminate Nelson's employment. Based on the district court's findings and

the robust record support for them, the district court correctly concluded that Switzer is not entitled to official immunity for her role in the adverse employment actions.[2]

IV.

In her related appeal, Nelson challenges the district court's exclusion of the punitive-damages award in its amended order. We review a district court's punitive-damages decision for an abuse of discretion. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 162 (Minn. App. 2007); *see also Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 813 (Minn. App. 1992) (A [district court] has broad discretion in determining whether to set aside a verdict as being excessive."), *review denied* (Minn. May 24, 1992).

The MHRA permits up to $25,000 in punitive damages when a violation is committed by a political subdivision of the state. Minn. Stat. § 363A.29, subd. 4(b). Up to $10,000 in punitive damages are permitted as a remedy for retaliation against a person who reports suspected maltreatment. Minn. Stat. § 626.557, subd. 17(b). "Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a) (2010). A defendant acts with deliberate disregard for the rights or safety of others when

> the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

[2] In light of our analysis and conclusions as to the issues raised by the county and Switzer, the district court's denial of their motion for a new trial was legally sound.

> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Id. An award of punitive damages must be based on factors that "justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, . . . the duration of the misconduct and any concealment of it, . . . [and] the attitude and conduct of the defendant upon discovery of the misconduct." *Id.*, subd. 3 (2010). Once the fact-finder grants a punitive-damages award, the district court must review the punitive-damages award in light of these factors and make findings with respect to them. *Id.*, subds. 4-5 (2010).

The district court initially awarded Nelson $8,500 in punitive damages without explaining the basis for the award and whether it was assessed against the county, Switzer, or both. In its amended order, the district court[3] applied Minn. Stat. § 549.20. But because the district court did not expressly conclude in its original order that there was "clear and convincing" evidence that the acts of the county and Switzer exhibited a "deliberate disregard for the rights and safety of others," the district court excluded the $8,500 award in its amended order.

When awarding punitive damages, the district court must base the award on the statutory factors and make specific findings with respect to those factors. *See id.*, subds. 3-5. Here, the district court acted as the fact-finder when it awarded punitive damages.

[3] The district court judge who presided at trial retired before the posttrial proceedings occurred. Pursuant to Minn. R. Civ. P. 63.01, the case was assigned to a different district court judge who ruled on the parties' posttrial motions.

In its posttrial review, the district court did not expressly address the punitive-damages award in light of the relevant factors, such as the seriousness of the hazard to the public resulting from Switzer's actions, the degree of awareness of the misconduct, and involvement in concealing the misconduct. Rather, it held that, because when serving as the fact-finder at trial, the district court must make an express finding that "clear and convincing evidence" supports a punitive-damages award, the failure to do so here required exclusion of the award. This posttrial determination was erroneous.

The district court's order awarding punitive damages reflects its conclusion that the county's and Switzer's actions justified the punitive-damages award. Its findings that the county's and Switzer's conduct was willful and malicious and resulted in adverse employment treatment of Nelson are supported by "clear and convincing evidence" that the county and Switzer exhibited deliberate disregard for the rights or safety of others. The district court found, as the record reflects, that patient safety was endangered, deliberate misrepresentations about Nelson were made to external entities, and Nelson suffered severe mental anguish and pain as a result of the county's and Switzer's treatment of her. The district court's order awarding punitive damages thus evinces consideration of both "those factors which justly bear upon the purpose of punitive damages" and the quantum of evidence required to award punitive damages as contemplated in Minn. Stat. § 549.20, subds. 1, 3.

The record establishes that the punitive-damages award was proper and well supported by the district court's findings. Accordingly, we reverse the posttrial exclusion

of punitive damages from the judgment and remand to the district court for reinstatement of the punitive-damages award.

Affirmed in part, reversed in part, and remanded.