STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1703

Lora Walker,
Appellant,

vs.

Hennepin County,
Respondent.

Filed April 5, 2011
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CV-10-4915

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Considered and decided by Lansing, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's dismissal of her disability-discrimination suit under Minn. R. Civ. P. 12.02(e). Because we conclude that (1) the facts as alleged in

the complaint and the reasonable inferences drawn therefrom are sufficient to state a claim of disability discrimination and (2) the district court erred in drawing inferences against appellant in evaluating the sufficiency of appellant's complaint, we reverse and remand.

FACTS

Because the issue before us is whether the district court properly granted a motion to dismiss, we take the facts as they are alleged in the complaint. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (reviewing court must consider only the facts alleged in the complaint, accepting them as true, and construe all reasonable inferences in favor of the nonmoving party when reviewing a dismissal pursuant to Minn. R. Civ. P. 12.02(e)).

Appellant Lora Walker has had Type I diabetes since 1990. Because of the "severe highs and lows" in her blood-sugar levels, appellant needs to "test her blood sugar several times a day and self-administer medication through an insulin pump." Accordingly, appellant needs "access to a private area with a sanitary medical surface, and a container to safely dispose of sharp needles." Use of an insulin pump requires appellant to have access to supplies and to change the equipment every two days or as insulin is depleted. When the insulin supply is depleted, appellant needs to take an hour break. Appellant also requires weekly appointments with her "educator" and monthly appointments with her doctor.

Appellant began working for respondent Hennepin County in the Human Services and Public Health Department (HSPHD) in 1991. Appellant was a contract manager in

the child-protection division and, in 2006, was promoted to the position of senior planning analyst. Appellant's duties included "managing contracts, administrative reporting, and communicating with social workers." Appellant "managed up to fourteen contracts while other employees in her position managed five or six contracts." HSPHD's office is located in downtown Minneapolis. From 1998 through 2007, appellant telecommuted from her home office.

In November 2007, appellant was hospitalized because of her diabetes. She was restricted to a three-hour workday for the two weeks following her release and, during that time, "performed part-time, 'light duty' work activities" from home. In December 2007, appellant received a new supervisor.

Appellant first met with her new supervisor in January 2008. She told her supervisor about her recent hospitalization and, for the first time, disclosed to HSPHD that she had diabetes. Appellant requested that her workload be reduced in order to accommodate her diabetes. Appellant's supervisor did not immediately respond to her request.

From March 20 through April 14, appellant used vacation time to have "required eye surgery and attend medical appointments." When appellant returned to work on April 17, her supervisor told her that the duties of a recently retired employee would be assigned to the remaining employees, but that appellant's workload would not change. Appellant was also now required to work in the downtown office two days per week "in order to increase cohesiveness in [the] unit." However, appellant's workstation was not near other members of her unit but in the middle of another unit, away from other

planners and contract managers. Appellant subsequently provided her supervisor with a "medical note . . . requesting consistent activities to help regulate blood[-]sugar fluctuations" and indicating that she needed time to test her blood sugar and perform adjustments to her insulin pump.

Beginning in May, appellant began to discuss accommodations with her employer. She first met with the disability representative, who concluded that a telecommuting arrangement would be appropriate and told appellant that she did not need to complete a form regarding the accommodation. Appellant then met with her supervisor to discuss the medical note. The supervisor told appellant to put her concerns in writing and describe the tasks that appellant would have difficulty performing as well as what appellant needed in order to do her job and maintain her health. Approximately a week later, appellant responded to her supervisor's request and offered examples of accommodations made by another employer. When a week passed without a response, appellant followed up with her supervisor, who told her that she needed to complete a specific form. Appellant told her supervisor that she was concerned because nearly a month had passed since she had provided the medical note and no action had been taken.

Appellant subsequently met with the disability representative, her supervisor, and her former supervisor. Appellant was told that her medical note "was 'too vague to do anything about.'" Appellant's former supervisor told her that "she could have access to a public restroom and use the baby changing table in full view of anyone entering the restroom to use as a sanitary medical surface"; she "could arrange with building maintenance to get [the table] cleaned" if necessary; and a container was not available to

dispose of her sharp needles. The disability representative acknowledged that this was not an accommodation because it was available to everyone. Although she denied any performance issues, appellant's supervisor required appellant to work downtown "in order to maintain greater supervision over [her]." Appellant was told that if she was sick on days that she was scheduled to work downtown, the absences would become a performance problem. The next day, "[appellant] took sick leave."

Appellant provided a second medical note. The next day, appellant's supervisor requested that a sharp needle container be placed in the women's bathroom on the floor where appellant worked and also asked whether a lock could be installed on the entrance door to allow for privacy.[1] Shortly thereafter, appellant's supervisor required that she work downtown full-time so that she was accessible both to the supervisor and the social workers working in the office. In July, appellant requested leave under the Family and Medical Leave Act (FMLA), which was approved.

Appellant's doctor approved her request to work from home two days per week in August. Appellant's supervisor stated that appellant would not be allowed to return to work until she was able to work downtown. Appellant provided additional documentation from her doctor stating that she has serious medical issues that require her to work from home or telecommute and that the initial two-day work week was needed so that appellant could make adjustments in her medication while returning to work.

Appellant met with her current and former supervisors in September. Appellant was told that she was expected to return to work downtown full-time and was given an

[1] As of December 2008, these items had not been furnished.

accommodation request form. Appellant responded that she was not able to work because HSPHD refused to accommodate her medical restrictions.

Appellant subsequently sought reassignment to a similar position "that allowed a work environment and hours similar to the one she previously used for her return from [FMLA leave]." Appellant then "requested a return to an equivalent position with duties, conditions and responsibilities, . . . that was substantially similar to her previous arrangement." Appellant also submitted her third accommodation request.

In October, appellant's supervisor told her that she had exhausted her FMLA leave and that she would be placed on medical leave without pay. Appellant had a second meeting with the disability representative and her current and former supervisors; although the disability representative "stated that telecommuting seemed like the most reasonable solution," the supervisors demanded that appellant begin working downtown part-time. Appellant's supervisor later sent a letter stating that if appellant did not return to work on November 3, 2008, HSPHD would deem her to have resigned. Against medical advice, appellant began working downtown four hours per day. Appellant had many insulin reactions throughout November and could not work every day.

In December, appellant took a second leave "because her progressively adversarial work environment had aggravated her health problems." Appellant's doctor recommended that she remain on leave until allowed to work from home. Appellant's supervisor demanded that she return to work full-time in May 2009, without any accommodation. Appellant again attempted to obtain reassignment or a transfer, and was medically laid-off the following month.

Appellant initially proceeded through the Minnesota Department of Human Rights, but filed this action after the parties failed to reach a resolution. Respondent moved to dismiss appellant's complaint for failure to state a claim under Minn. R. Civ. P. 12.02(e) on grounds that respondent was entitled to vicarious official immunity, among other things.

In granting respondent's motion, the district court first concluded that HSPHD's acts were discretionary and therefore protected under the doctrine of official immunity. Second, the district court stated that the law regarding the classification of diabetes as a disability was too unclear for HSPHD's acts to have been malicious. The district court observed that the facts alleged by appellant lie somewhere between no material impairment of a major life activity and a material impairment and, "[b]ecause [HSPHD] could have reasonably concluded (consistent with [the caselaw]) that [appellant's] diabetic condition did not constitute a disability under the MHRA, there can be no determination that its employees acted maliciously . . . ." This appeal follows.

D E C I S I O N

On appeal from dismissal for failure to state a claim pursuant to Minn. R. Civ. P. 12.02(e), we review de novo whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). In doing so, we "consider only the facts alleged in the complaint, accepting those facts as true and . . . construe all reasonable inferences in favor of the nonmoving party." *Bodah*, 663 N.W.2d at 553. "'[A] pleading will be dismissed only 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) (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)).

A. Official and vicarious official immunity

As a question of law, we review the application of immunity de novo. *Sletten v. Ramsey Cnty.*, 675 N.W.2d 291, 299 (Minn. 2004). Official immunity protects from personal liability public officials charged by law with duties requiring the exercise of judgment or discretion. *Anderson. v. Anoka Hennepin Ind. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

> The determination of whether to grant immunity in each case depends on the kind of discretion which is exercised and whether or not the challenged government activities require something more than the performance of ministerial duties. If the activity is absolute, certain, and imperative, involving the execution of a specific duty arising from fixed and designated facts, it will be deemed ministerial, and official immunity will not be available.

Sletten, 675 N.W.2d at 304. Moreover, "the mere existence of some degree of judgment or discretion will not necessarily confer common law official immunity." *Anderson*, 678 N.W.2d at 656. We must focus on the specific conduct at issue. *Id.*

"[V]icarious official immunity protects the government entity from suit based on the official immunity of its employee." *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998). This doctrine protects the government entity "because of the inconsistency that would result from imposing liability on a government employer for the same acts for which an employee receives immunity." *Pahnke v. Anderson Moving &*

Storage, 720 N.W.2d 875, 884 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006). Vicarious official immunity applies "in situations where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their government employer would also sustain liability as a result of their actions." *Anderson*, 678 N.W.2d at 664. Vicarious official immunity generally is extended to the government entity if its employee is qualified for official immunity, but it is not automatic. *Sletten*, 675 N.W.2d at 300; *see Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992) ("In the final analysis, whether to extend official immunity to the governmental employer is a policy question.").

Official immunity does not apply in situations where the public official is guilty of a willful or malicious wrong. *Anderson*, 678 N.W.2d at 655. A malicious wrong is "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quotation omitted); *see id.* (stating that, for purposes of official immunity, "wilful and malicious are synonymous"). The law establishes a high standard for finding a malicious wrong. *Anderson*, 678 N.W.2d at 662. The official "must have reason to know that the challenged conduct is prohibited" and faces "liability only when [he or she] intentionally commits an act that he or she then has reason to believe is prohibited." *Rico*, 472 N.W.2d at 107. "[T]he legal reasonableness of the official's actions is relevant to whether the public employee committed a wilful or malicious wrong . . . ." *Id.* at 108.

B. Minnesota Human Rights Act

The Minnesota Human Rights Act (MHRA) prohibits employers from discharging or discriminating against employees on the basis of disability. Minn. Stat. § 363A.08, subd. 2(2), (3) (2010). Official immunity can bar a discrimination claim brought under the MHRA where there is no showing of willfulness or maliciousness. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). Again, the availability of official immunity is dependent upon the nature of the government conduct at issue. *Id.* To determine whether official immunity bars a discrimination claim brought under the MHRA, a court must first determine whether the alleged discriminatory acts are the type of conduct covered by official immunity and, second, "whether the alleged discriminatory acts, even though of the type covered by official immunity, were malicious or willful and therefore stripped of the immunity's protection." *Davis v. Hennepin Cnty.*, 559 N.W.2d 117, 122 (Minn. App. 1997), *review denied* (Minn. May 20, 1997).

1. Nature of government conduct at issue

While appellant does not state expressly the precise government conduct at issue, it appears to us from a reading of her complaint that appellant challenges HSPHD's failure to make reasonable accommodations for her diabetes as well as the termination of her employment. The decision to discharge an employee is discretionary and therefore generally protected by official immunity. *See Rico*, 472 N.W.2d at 107 (decision to remove unclassified, policy-making employee, who could be removed at any time, was discretionary and thus protected by official immunity); *see also Janklow v. Minn. Bd. of*

Examiners for Nursing Home Admin., 552 N.W.2d 711, 717 (Minn. 1996) (decision to terminate an employee is discretionary for purposes of statutory immunity given the balancing of many complex factors involved). A public official's response to an individual's illness or disability is also generally viewed as a discretionary decision as "[t]he facts that impose the requirements for accommodation are inherently variable and thus the public employee who has the responsibility of fashioning the accommodation must exercise discretion rather than fulfilling a specific duty based on a fixed set of facts." *Mowatt v. Hennepin Cnty.*, Nos. C0-01-1518, CX-01-1610, 2002 WL 857733, at *4 (Minn. App. May 7, 2002) (official immunity applied to accommodation decisions made by county-employer because "[t]he decision of how best to accommodate an individual whose illness impedes his ability to work involves the balancing of many complex factors, including efficiency in the workplace, job performance, employee morale, economic feasibility, and the individual's health and limitations"). Because an employer's decisions in terminating an employee and making reasonable accommodations are discretionary, HSPHD is protected, as well as respondent vicariously, by official immunity unless HSPHD's actions were malicious. *See Anderson*, 678 N.W.2d at 655.

2. Maliciousness

In order for government conduct to be malicious, the public official must have had reason to believe that the conduct was prohibited or in violation of a known right. *Rico*, 472 N.W.2d at 107. "The same evidence necessary to prove discrimination also satisfies the evidentiary requirement for demonstrating willful or malicious conduct for purposes

of official immunity." *Davis*, 559 N.W.2d at 123. Here, maliciousness is predicated upon appellant pleading facts showing that HSPHD had reason to know that she was a disabled person, and thus a member of a protected class, under the MHRA. *See* Minn. Stat. § 363A.08, subd. 2 (2010) (prohibiting discriminatory practices relating to employment and employment policies on the basis of disability).

Under the MHRA, "disability" is defined as "any condition or characteristic that renders a person a disabled person." Minn. Stat. § 363A.03, subd. 12 (2010). "A disabled person is 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." *Id.* (emphasis added). "[M]ajor life activities are those activities that are of central importance to daily life. . . . [and] includ[e] caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 553 (Minn. App. 2005) (quotations and citation omitted). We recognize that "diabetes is an impairment," but insulin dependence alone does not qualify as a material impairment. *See Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228-29 (Minn. 1995). Appellant's diabetic condition must materially impair one or more major life activities in order to qualify as a disability under the MHRA. *See* Minn. Stat. § 363A.03, subd. 12.

We agree with appellant that, under some circumstances, diabetes can materially limit one or more major life activities. In *Gee*, the employee developed diabetes during her employment and subsequently required hospitalization and nine surgeries, including

amputation of a toe and laser surgery in one eye, based on complications arising from her diabetes. 700 N.W.2d at 551. As a result, the employee walked with a cane, avoided placing weight on her right foot, wore a leg brace, and had difficulty reading due to vision problems. *Id.* The employee brought a disability-discrimination suit, asserting "that her impairments have materially limited her major life activities of walking and seeing." *Id.* at 553. The district court granted summary judgment for the employer based on the employee's failure to establish that she was disabled or that an issue of material fact existed on the question of whether she was disabled because the employee's diabetes did not limit the major life activity of working. *Id.* at 552-53. We reversed, concluding that the district court had too narrowly interpreted "major life activities" as pertaining only to working and that the employee had "introduced evidence that her diabetes and related complications cause her difficulty [in the major life activities of walking and seeing]." *Id.* at 554.

Appellant's complaint alleges that she suffered from diabetes, was required to test her blood sugar several times a day, and self-administer medication from an insulin pump. The complaint also reflects that she was hospitalized at least once for complications related to diabetes in 2007. Following this hospitalization, appellant was placed on work restrictions for two weeks. Appellant told her supervisor about her diabetes and these complications and requested accommodation. Appellant then took leave in order to have "required eye surgery and attend medical appointments." Although the complaint does not state that the surgery and appointments were related to appellant's diabetes, we must construe all reasonable inferences in favor of appellant and it is

reasonable that this treatment could be related to her diabetes or some accompanying complication. *See Bodah*, 663 N.W.2d at 553. The complaint also shows that appellant met with HSPHD personnel, including a disability representative, to discuss accommodations; provided at least three medical notes to HSPHD regarding her condition; and took three additional leaves during this time, including "sick leave" and FMLA leave, which could also be reasonably inferred to relate to her diabetes. *See id.*

"Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 660 (Minn. App. 2009); *see* Minn. R. Civ. P. 8.01 ("A pleading . . . shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought . . . .").

> The functions of a pleading today are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based, to permit the application of the doctrine of res judicata, and to determine whether the case must be tried by the jury or the court. No longer is a pleader required to allege facts and every element of a cause of action.

Franklin, 265 Minn. at 395, 122 N.W.2d at 29 (citations omitted).

Taking the facts alleged in the complaint as true and construing all reasonable inferences in favor of appellant, the complaint establishes that appellant told HSPHD about her disability, repeatedly requested but was denied accommodation, and then was terminated when she was not able to be physically present in the office, despite the fact

that (1) her doctors recommended that she be allowed to work from home, (2) she had previously worked successfully from home, and (3) other employees were allowed to work from home. These allegations are sufficient to give respondent fair notice of the actions taken by HSPHD that constitute disability discrimination in violation of appellant's rights as a member of a protected class under the MHRA. *See id.* at 394, 122 N.W.2d at 29.

While the district court accurately observed that appellant's "circumstances lie somewhere between the impairment established in *Sigurdson* and impairment established in *Gee*," we agree with appellant that "[w]hatever the disability threshold is, it could be inferred from these facts that [appellant's] diabetes was a disability and that [HSPHD] had reason to know that [appellant] had a disability that [HSPHD] was required to reasonably accommodate." *See Davis*, 559 N.W.2d at 123-24 (holding that county-employer's response to allegations of sexual harassment was discretionary, but that issues of material fact as to whether county had acted maliciously precluded summary judgment for county on the basis of official immunity). The district court ruled that respondent was entitled to vicarious official immunity "[b]ecause [HSPHD] could have reasonably concluded . . . that [appellant's] diabetic condition did not constitute a disability under the MHRA." By inferring what HSPHD could have reasonably concluded—that appellant's diabetes was not severe enough to constitute a disability—instead of construing all reasonable inferences in favor of appellant, the district court erred when considering the sufficiency of appellant's complaint.

3. Policy considerations

Appellant argues that vicarious official immunity is not available to respondent on policy grounds. As we have stated, our review focuses only on the sufficiency of the allegations in the complaint.[2] "Although immunity generally absolves a defendant from the costs associated with defending a suit, the burden remains with the defendant to allege facts sufficient for a court to determine as a matter of law that the immunity applies." *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997). Respondent has the burden to show that it qualifies for vicarious official immunity. *See id.* ("[A] defendant relying upon an immunity bears the burden of proving he or she fits within the scope of the immunity."). Because we conclude as a matter of law that the district court erred in dismissing appellant's suit based on the four corners of the complaint, we decline to consider whether policy bars respondent from enjoying vicarious official immunity. *See Beaulieu*, 518 N.W.2d at 571-72 ("In determining whether an official has committed a malicious wrong, [the fact-finder] consider[s] whether the official has intentionally committed an act that he or she had reason to believe is prohibited.").

Reversed and remanded.

[2] While appellant submitted additional information in response to respondent's motion, the district court expressly stated that it was not considering this evidence. *Cf.* Minn. R. Civ. P. 12.02 ("If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ."). Thus, respondent's motion for failure to state a claim "serves an extremely limited function [and t]he only factual information presented is that which is disclosed by the pleadings as a whole." *Franklin*, 265 Minn. at 394, 122 N.W.2d at 29.