STATE OF MINNESOTA

IN SUPREME COURT

A21-0004

Court of Appeals

Moore, III, J.
Concurring in part, dissenting in part,
Anderson, J, Gildea, C.J.

Barbara Henry,

Respondent/Cross-Appellant,

vs.

Filed: February 8, 2023
Office of Appellate Courts

Independent School District #625,
a/k/a Saint Paul Public Schools,

Appellant/Cross-Respondent.

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Leslie L. Lienemann, Celeste E. Culberth, Culberth & Lienemann, LLP, Saint Paul, Minnesota; and

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S Y L L A B U S

1. The employee did not create a genuine issue of material fact on her claim of a hostile work environment based upon age under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01–.50 (2022), when the conduct alleged was not sufficiently severe or pervasive for a reasonable person to find the work environment to be hostile or abusive.

2. To establish an adverse employment action in the form of constructive discharge as part of a discrimination claim under the Minnesota Human Rights Act, an employee is not necessarily required to prove the existence of a hostile work environment, but must demonstrate that the employer's actions were intended to force the employee to quit—as the employee did here—either by demonstrating (1) that the employer deliberately created intolerable working conditions with intent to force the employee to quit, or (2) that resignation was a reasonably foreseeable consequence of the employer's discriminatory actions.

3. The employee did not establish the adverse employment action element of a claim of age-based disparate treatment under the Minnesota Human Rights Act by relying on the cumulative effect of the employer's actions.

Affirmed in part and reversed in part.

O P I N I O N

MOORE, III, Justice.

This case arises out of an age-based employment discrimination claim under the Minnesota Human Rights Act. Minn. Stat. § 363A.08, subd. 2 (2022). Respondent/cross-appellant Barbara Henry alleged that she suffered a hostile work environment and disparate treatment culminating in constructive discharge during her employment at appellant/cross-respondent Saint Paul Public Schools (School District). The district court granted summary judgment for the School District on both claims, ruling in part that Henry had "voluntarily resigned her position without taking advantage" of the School District's anti-discrimination policies. The court of appeals reversed summary judgment on the disparate treatment claim but affirmed summary judgment on the hostile work environment claim. We affirm the court of appeals' conclusions that (1) the School District's alleged actions do not rise to the level of pervasiveness or severity needed to support a hostile work environment claim, and (2) a genuine issue of material fact exists as to whether Henry was constructively discharged. We reject, however, the court of appeals' consideration of the "cumulative effect" of the School District's alleged actions in analyzing the disparate treatment claim. Therefore, we affirm in part and reverse in part.

FACTS

The facts giving rise to this lawsuit are largely undisputed. Barbara Henry worked as a network technician for the School District from 1997 to 2017. Henry was on the infrastructure team and worked primarily on maintaining the School District's wireless

connectivity and wide area network. She was promoted to the position of network technician II in 2007 at the age of 47. She received excellent performance reviews for most of her career with the School District, and former supervisors and colleagues spoke highly of her work ethic and work performance.

In 2014, the School District hired Idrissa Davis to serve as the new Deputy Chief of Technology Services. Davis had a background in corporate information technology services and sought to use that experience to make the School District's technology department more efficient. In 2016, Davis brought in Sonya Zuker as the Director of Production Services. Around the same time, Davis hired Vicky Shine to be the Technology Services Manager. The reporting hierarchy after Shine began working for the School District was as follows: Henry reported to Shine, Shine reported to Zuker, and Zuker reported to Davis.

In fall 2016, Zuker and Shine conducted the first performance reviews of the infrastructure team since Davis was hired. The evaluations rated whether employees' performance was below standards, met standards, or exceeded standards. For the first time in her 19-year employment with the School District, Henry received a below-standards rating. Her performance review identified specific examples of deficiencies, including failing to meet deadlines, lack of visibility during work hours, failing to use the School District vans for travel (as required by the School District's policy), and speaking to Zuker in an agitated voice after being excluded from a training session.

On November 4, 2016, Zuker recommended placing Henry on a performance improvement plan (PIP) due to the below-standards performance review. The letter

explaining the recommendation stated that Henry was "managing a fraction of the required work" for her position and "[o]n several occasions" had "been resistant to: adopting processes, providing additional assistance to non-wireless projects, completing tasks as assigned or within established parameters," and meeting deadlines.

On November 22, 2016, Zuker and Shine gave Henry another written performance review, again giving her an overall below-standards rating. This performance review identified specific examples of the deficiencies that led to the below-standards ratings, including missing deadlines, not responding to requests, missing a meeting, continuing to use her personal vehicle, and failing to share her knowledge with coworkers.

The same day, Zuker delivered a PIP to Henry, requiring the following improvements: (1) "prioritize and manage multiple tasks" and "[r]emain focused on the task at hand so that it can be completed in a timely manner but also maintain flexibility to switch gears if necessary and reprioritize as things come up;" (2) "[b]e able to meet deadlines to 100% completion;" (3) "[p]roactively identify knowledge gaps and initiate solutions on how to close those gaps;" (4) "remain visible throughout the day and inform [manager] of her whereabouts if outside of the office;" (5) "[e]nsure attendance for all scheduled meetings;" (6) "use remote tools to troubleshoot wireless and phone issues whenever possible;" (7) "initiate and request additional training and resources to efficiently perform all job duties;" and (8) "coordinate the cross training and transfer of knowledge to members of the team when requested to do so."

In April 2017, Shine completed a follow-up review of Henry's performance. As in the review of only 5 months earlier, Henry received a below-standards rating overall. The

post-PIP review again identified specific examples of Henry's performance deficiencies, including gaps in knowledge, problems following through on requests, missed deadlines, issues with visibility and abiding by the required work schedule, the continued use of her personal vehicle, and the failure to follow through on career development and training opportunities. Based on these deficiencies, Shine, Henry's direct supervisor, recommended that the School District terminate Henry's employment.

On May 5, 2017, Davis wrote a letter to Henry explaining that he was considering terminating her employment for failing to meet the terms of the PIP. The letter advised Henry that before a termination decision was made, she could present a statement in her defense directly to Davis with her union representative present. Instead, after consulting with her union steward, Henry retired before the meeting occurred. She was 57 years old.

After Henry resigned, she filed a timely charge of age discrimination with the Minnesota Department of Human Rights[1] and then filed a complaint in district court. Henry alleged in her complaint that the School District engaged in disparate-treatment age discrimination in violation of the Minnesota Human Rights Act (Human Rights Act) when it constructively terminated her in 2017. *See* Minn. Stat. § 363A.08, subd. 2. Henry also claimed that the School District's discriminatory actions "created a hostile work environment."

[1] The Minnesota Department of Human Rights investigated Henry's claims but ultimately dismissed Henry's charge. The Department found no probable cause to conclude that discrimination had occurred because Henry failed to establish that the alleged discriminatory conduct was an adverse employment action.

During the discovery process, Henry's counsel deposed several of Henry's former supervisors and coworkers. Zuker, who supervised Henry's direct supervisor, explained that Davis used PIPs to force employees out by either forcing them to resign or terminating them. Zuker stated that Henry was "specifically target[ed]" for "performance" issues and that Davis instructed her "to make it look like [Henry] was not performing" by writing the PIP in a way that Henry could not achieve. Zuker specifically testified about notes she took during a meeting with Davis in March 2017 in which he instructed her to make Henry's PIP "unrealistic" and to pile on extra work so Henry would not pass the performance evaluation, which would ultimately lead to her termination. In her notes from this meeting, Zuker wrote "[Henry]—out by May—rehire." Zuker testified that, although she did not believe the statements made in Henry's performance reviews were necessarily false, she agreed they were "exaggerated," and that Henry's PIP was "unwarranted."

Zuker testified that she did not recall Davis ever saying anything about Henry's age, but recalled that on one occasion, Davis instructed her not to allow Henry to participate in a training. Zuker explained that this decision was made because Henry was being "performance managed, so rather than train [her] up so [she] can perform better," Davis instructed Zuker to "just take away formal training and not spend the money on [her]." Zuker also stated about the department generally:

> If I look at the track record of who is—who was asked to leave or forced to leave, they are all of our older staff, you know, for whatever reason, whether it's salary, whether it's specifically age, all of our staff who were forced out, whether to make their lives miserable or because they were picked out, they are all of our older staff.

A former coworker who supervised Henry for a year testified that he believed Davis was targeting older employees so he could bring in younger employees. He also testified that he believed Davis discriminated against Henry based on her age and that while he managed Henry, her work was exceptional. He recalled Davis saying that "problems within the department are because people are too old and that they're overpaid white people." This former coworker also testified that Davis created an environment where employees were reluctant to report discriminatory conduct for fear of retaliation.

Another of Henry's former supervisors testified that there was a pattern of management trying to get rid of older employees with many years of service and replacing them with younger employees. He described Davis's management style as "hostile." He also testified that during the 15 years he managed Henry, she performed her job at a level that "exceed[ed] standards" in "all categories."

A different former coworker also believed there was "a pattern" of Davis getting rid of older employees to replace them with younger employees. She stated that "every month or every few months," a different person over 40 was "gone." She further testified that Davis specifically targeted Henry and that Henry's placement on a PIP was "unfounded," noting that Henry was being disciplined for things other employees routinely did. Specifically, she explained that other employees were driving their personal vehicles rather than the School District's van, but Henry was "the only one that was singled out for it." She also acknowledged that it was common for Davis "to belittle or mock" and yell at people during meetings.

Henry believed that she was being discriminated against based on her age. She explained that this belief was based on being at the top of her pay scale and because budget cuts were anticipated. She further testified that she heard Davis remark that most of the network team was "nearing retirement, so within the next five years, you know, there will be a turnover." Henry also described an incident during an infrastructure team meeting when Davis said that "long-term employees should consider retirement and travel like his parents." Henry testified that she believed Davis was looking directly at her when he made this comment.

The School District moved for summary judgment on Henry's age discrimination claims. The School District argued that Henry's constructive-discharge-based disparate treatment claim is untenable because she neither suffered an adverse employment action nor took advantage of the School District's anti-discrimination policies by reporting her concerns before retiring. The School District also argued that Henry could not show that she experienced a hostile work environment because the criticism that she received at work falls short of the legal standard for unwelcome harassment. Henry responded that there are several key fact disputes that preclude summary judgment. She also asserted that "there is substantial evidence that she was forced to quit her position and that she would have been terminated no matter how she performed."

The district court granted summary judgment to the School District, ruling that Henry "failed to show the existence of a fact dispute" that would preclude summary judgment. The court concluded that Henry "voluntarily resigned her position without taking advantage of [the School District's] anti-discrimination policies," causing her claim

to fail under the Human Rights Act. In reaching this conclusion, the court relied on federal precedent, stating that a plaintiff cannot establish constructive discharge if she quits without giving her employer a reasonable chance to remedy the mistreatment or work out the problem. *See Blake v. MJ Optical, Inc.*, 870 F.3d 820, 826 (8th Cir. 2017). Because Henry "did not pursue *any* administrative remedy that was available to her," the court determined that her "claim cannot survive on these facts, no matter how egregious the underlying circumstances that she is alleging." In addition, while acknowledging that Henry had "submitted evidence that purports to show a culture of systematic age discrimination" in her work environment, the court determined that Henry had "not shown how she was the victim of any workplace behaviors that rose to the level of harassment based on her age."

The court of appeals affirmed in part, reversed in part, and remanded. *Henry v. Indep. Sch. Dist. #625*, 964 N.W.2d 667, 681 (Minn. App. 2021). The court of appeals concluded that Henry had "presented sufficient evidence of disparate-treatment age discrimination to withstand summary judgment" under the *McDonnell Douglas* burden-shifting framework. *Id.* at 681; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Specifically, the court of appeals concluded that she had established a prima facie case of age discrimination under *McDonnell Douglas* by producing sufficient evidence to establish that she suffered an adverse employment action in two different ways: first, by presenting evidence that she had been constructively discharged; and second, by "the cumulative evidence" of the School District's actions. *Henry*, 964 N.W.2d at 678–79.

The court of appeals rejected the School District's argument that the affirmative defense we adopted in *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558, 570–71 (Minn. 2008), precludes Henry from claiming a constructive discharge to support her disparate treatment claim.[2] In doing so, the court of appeals explained that "the Minnesota Supreme Court has declined to extend the *Frieler* defense beyond hostile-work-environment claims." *Henry*, 964 N.W.2d at 679 (citing *Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 669, 678 (Minn. 2014)). And the court of appeals had no need to apply the *Frieler* defense to the hostile work environment claim, concluding that the evidence was insufficient to establish the existence of an age-based hostile work environment because the conduct at issue "[did] not rise to the level of pervasiveness or severity required" to support a hostile work environment claim. *Id.* at 681.

We granted the School District's petition for review on four issues: (1) whether a hostile work environment is an element of constructive discharge; (2) whether the affirmative defense we recognized in *Frieler* applies to constructive discharge claims; (3) whether we should recognize "cumulative" adverse employment actions "as an independent theory apart from hostile work environments and constructive discharge"; and

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[2] In *Frieler*, we adopted an affirmative defense—first recognized in two U.S. Supreme Court cases—for employers facing claims of "workplace supervisor sexual harassment" under the Human Rights Act. 751 N.W.2d at 568–69; *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 804–08 (1998). "In circumstances when no tangible employment action is taken against the employee," an employer may raise an affirmative defense to liability or damages for supervisor harassment if the employer establishes: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm. *Frieler*, 751 N.W.2d at 570–71.

(4) if we recognize the theory of "cumulative" adverse employment actions, whether the *Frieler* affirmative defense applies to that theory. We also granted Henry's request for conditional cross-review on the issue of whether she presented sufficient evidence of an age-based hostile work environment to survive summary judgment.

ANALYSIS

This case comes to us on appeal from the district court's grant of summary judgment in favor of the School District on Henry's age-based disparate treatment and hostile work environment claims under the Human Rights Act, Minn. Stat. §§ 363A.01–.50 (2022). We review a district court's summary judgment decision de novo. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020). In doing so, we examine whether there are any genuine issues of material fact and whether the district court properly applied the law. *Id.* We view the evidence in the light most favorable to the nonmoving party—here, Henry—and resolve all doubts and factual inferences against the moving party—here, the School District. *See Warren v. Dinter*, 926 N.W.2d 370, 375 (Minn. 2019). We do not weigh evidence or assess credibility at the summary judgment stage; instead, we ask whether "reasonable persons might draw different legal conclusions from the evidence presented." *Kenneh*, 944 N.W.2d at 228. If so, summary judgment must be denied. *Id.* We have noted that summary judgment is a "blunt instrument," and we are cautious not to "usurp[] the role of a jury when evaluating a claim on summary judgment." *Id.* at 232 (citation omitted) (internal quotation marks omitted). "The construction of the Human Rights Act's provisions is a question of law that we review de novo." *Id.* at 228.

The Human Rights Act provides that an employer may not, because of age, "discharge an employee," or "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08, subd. 2(2)–(3). In construing the Human Rights Act, we look to both Minnesota case law and federal case law arising under similar federal statutes, Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act (ADEA). *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999); *Dietrich v. Canadian Pac., Ltd.*, 536 N.W.2d 319, 323 n.3 (Minn. 1995). Federal case law, however, does not "bind Minnesota courts in the application of [the Human Rights Act]." *Kenneh*, 944 N.W.2d at 231. "Historically, the Human Rights Act has provided more expansive protections to Minnesotans than federal law." *Id.* at 229.

In addressing the issues for which we granted review, we begin with the hostile work environment claim because both the School District and Henry petitioned for our review on aspects of the court of appeals' hostile work environment analysis. In Part I, we address Henry's challenge to the court of appeals' affirmance of summary judgment on her hostile work environment claim. In Part II, we address the concept of constructive discharge as part of a disparate treatment claim, beginning with the standard applicable to establish an adverse employment action—including its relationship to the existence a hostile work environment—and then applying that standard to this case. Finally, in Part III, we address whether the "cumulative effect" of an employer's actions can constitute an alternative theory for establishing a disparate treatment claim.

I.

Henry challenges the court of appeals' determination that summary judgment in the School District's favor was proper on her hostile work environment claim. Henry alleges that, acting on Deputy Chief Davis's instructions, her supervisors repeatedly singled her out for trivial conduct and placed her on an intentionally unachievable PIP based on performance issues that were false or exaggerated. Henry maintains that these actions by School District management amounted to age-based harassment that was sufficiently severe and pervasive so as to create a hostile work environment and for her claim to survive summary judgment.

Generally, "verbal and physical harassment directed at an employee . . . may constitute discrimination in the terms and conditions of employment" under the Human Rights Act. *LaMont v. Indep. Sch. Dist. # 728*, 814 N.W.2d 14, 21 (Minn. 2012). We have never addressed an age-based hostile work environment claim, but we have considered hostile work environment claims in the sexual harassment/discrimination context. *See, e.g.*, *Kenneh*, 944 N.W.2d at 231–32; *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 798–99 (Minn. 2013); *Frieler*, 751 N.W.2d at 565. In that context, we require plaintiffs alleging a hostile work environment to show: (1) they are a member of a group that has protected status under the Human Rights Act; (2) they were subject to unwelcome harassment; (3) the harassment was based on their membership in a protected group; and (4) the harassment affected a term, condition, or privilege of their employment. *Frieler*, 751 N.W.2d at 571 n.11. The discriminatory conduct creating the hostile work environment must be so severe or pervasive so as "to alter the conditions of employment

and create an abusive working environment." *Kenneh*, 944 N.W.2d at 230. The "harassment must be more than minor: 'the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so.' " *Id.* at 230–31 (quoting *LaMont*, 814 N.W.2d at 22). Federal courts addressing hostile work environment claims based on age apply the same severe-or-pervasive standard and similarly require the elements listed above in cases involving alleged supervisor harassment. *See, e.g.*, *Rickard v. Swedish Match N. Am.*, 773 F.3d 181, 184–85 (8th Cir. 2014).

Though our cases interpreting the Human Rights Act have used the same "severe-or-pervasive framework" as federal courts interpreting federal law, we have stressed that our reliance on federal case law "does not mean that the conclusions drawn by those courts in any particular circumstances bind Minnesota courts in the application of our state statute." *Kenneh*, 944 N.W.2d at 231. Specifically, we have explained that our severe-or-pervasive standard "must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace." *Id.* "Each case must stand on its own circumstances," and fact-finders "must consider the totality of the circumstances" in each case, "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 231 (citation omitted) (internal quotation marks omitted). Thus, "[p]ervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole." *Id.* at 232.

The court of appeals affirmed summary judgment for the School District on Henry's hostile work environment claim, concluding that the conduct at issue did not rise to the level of pervasiveness or severity required to demonstrate that the alleged harassment affected a term, condition, or privilege of her employment. *Henry*, 964 N.W.2d at 681. We agree. Though the question of whether alleged harassment is sufficiently severe or pervasive is generally a question of fact for the jury, *see Kenneh*, 944 N.W.2d at 232, a reasonable juror could not conclude that the evidence here, when viewed objectively, demonstrates that Henry suffered verbal or physical harassment so severe or pervasive that it "alter[ed] the conditions of employment and create[d] an abusive working environment." *See id.* at 230. Henry testified that Davis, the Deputy Chief of Technology Services, was trying to get rid of her due to her age, but she also testified that Davis never yelled at her or otherwise acted unprofessionally toward her. None of Henry's colleagues recalled Davis ever being unprofessional toward her. While Henry and Henry's supervisor both testified to hearing Davis make age-related comments in the workplace, a reasonable juror could not conclude that these comments amounted to severe or pervasive harassment of Henry.

Absent some more objectively hostile or abusive behavior directed at Henry, what she is left with are the performance-related measures the School District took against her. Though, as we discuss below, these measures were seemingly designed to make her quit, they are a different form of discrimination than the type required to establish a hostile work environment. Notably, Henry did not allege any age-based verbal or physical harassment. Instead, she alleged that due to her age, the School District unfairly placed her on a PIP with the purpose of forcing her to quit. This allegation is more accurately characterized as

aged-based disparate treatment than a hostile work environment, which is a different theory of discrimination.[3]

We therefore affirm the court of appeals' determination that summary judgment was proper on Henry's hostile work environment claim because the School District's conduct in relation to her was not sufficiently severe or pervasive when viewed in the light most favorable to Henry.

II.

Having found that Henry's hostile work environment claim fails, we next turn to Henry's claim of age-based disparate treatment. The School District challenges the court of appeals' conclusion that Henry presented sufficient evidence to establish a prima facie case of age-based disparate treatment. *See Henry*, 964 N.W.2d at 680. Specifically, the School District challenges whether Henry established an adverse employment action,

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[3] The dissent erroneously concludes that Henry never presented a theory of disparate-treatment age discrimination to the district court. Although Henry's complaint does assert a single count of age discrimination in violation of the Human Rights Act, we construe pleadings liberally, "in civil rights cases especially." *L.K. v. Gregg*, 425 N.W.2d 813, 819–20 (Minn. 1988). There is no bar to pleading alternative or overlapping theories of liability—here an age discrimination claim based on disparate treatment and an age discrimination claim based on a hostile work environment. The district court considered both theories, and the court of appeals considered both theories. After reviewing "the complaint and record," the court of appeals explained that Henry raised "two theories of discrimination," specifically determining that she "sufficiently alleged a disparate-treatment age-discrimination and hostile-work-environment claim." *Henry*, 964 N.W.2d at 675 & n.2. Because the School District did not challenge this determination in its petition for review and has forfeited this issue, we consider both theories of age discrimination. *See In re Estate of Figliuzzi*, 979 N.W.2d 225, 231 n.4 (Minn. 2022) (noting that issues not raised in a petition for review are forfeited); *see also Hagen v. Burmeister & Assocs., Inc.*, 633 N.W.2d 497, 501 (Minn. 2001) (treating a "theory of recovery" that was litigated and not challenged "as if it had been pled").

which is one element of a disparate treatment claim. We start with the legal standards that govern Henry's disparate treatment claim and then move to an analysis of the specific issues raised to our court in the constructive discharge context.

We analyze Henry's claim of disparate-treatment age discrimination under the framework set out in *McDonnell Douglas*, 411 U.S. 792. *See Hanson v. Dep't of Nat. Res.*, 972 N.W.2d 362, 372–73 (Minn. 2022); *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 710–11 (Minn. 1992) (applying *McDonnell Douglas* to an age discrimination claim under the Human Rights Act). This framework applies on summary judgment when a plaintiff relies on circumstantial rather than direct evidence of age discrimination.[4] *Hanson*, 972 N.W.2d at 372–73.

There are three steps in the *McDonnell Douglas* burden-shifting framework: first, the plaintiff must establish a prima facie case of discrimination; second, the employer must articulate a legitimate, nondiscriminatory reason for its conduct; and third, the plaintiff must prove that the reason offered by the defendant is merely a pretext for discrimination.

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[4] The court of appeals rejected Henry's claim that she presented sufficient direct evidence of age discrimination to survive summary judgment. *Henry*, 964 N.W.2d at 676. The court of appeals concluded that, "[g]iving Henry the benefit of all reasonable inferences supported by the evidence, . . . the record does not contain direct evidence of age discrimination sufficient to withstand summary judgment." *Id.* Henry challenges this conclusion in her briefing here; however, she did not request review of that issue in her request for conditional cross-review. Therefore, the sufficiency of Henry's direct evidence is not properly before us, and we decline to reach that issue. *See Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 668 (Minn. 2014). Nor did Henry challenge the application of the *McDonnell Douglas* framework itself to her claim. We recently acknowledged the "debate about the continuing viability of the *McDonnell Douglas* framework." *Hanson*, 972 N.W2d at 377. However, because Henry did not raise this issue, we apply the *McDonnell Douglass* framework to her claim.

Id. at 373. Neither the analyses of the district court nor the court of appeals proceeded beyond the first step. We therefore focus our analysis on the question of whether Henry submitted sufficient evidence to establish a prima facie case of disparate-treatment age discrimination.

To establish a prima facie case of age discrimination based on disparate treatment, a plaintiff is generally required to show that: (1) she belongs to a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) circumstances exist that give rise to an inference of discrimination. *See Dietrich*, 536 N.W.2d at 323–24; *Feges*, 483 N.W.2d at 711; *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 637 (8th Cir. 2011). The School District does not contest that the evidence, when viewed in the light most favorable to Henry, would support a finding that Henry satisfies elements (1), (2), and (4).[5] The School District challenges the court of appeals' conclusion that a genuine issue of material fact exists as to whether Henry presented sufficient evidence to create a fact issue regarding element (3), that she suffered an adverse employment action. *Henry*, 964 N.W.2d at 679.

The School District argues that Henry's prima facie case fails because she voluntarily resigned her position and did not suffer any tangible adverse employment

[5] Whether Henry satisfied the fourth element, an inference of discrimination, was disputed before the court of appeals. The court of appeals concluded that the record supports a reasonable inference that age discrimination motivated the School District's conduct towards Henry. *Henry*, 964 N.W.2d at 680. The School District did not petition for review on this issue, nor does it raise that issue in its briefing. We therefore accept the court of appeals' conclusion on that element without addressing that issue and instead focus on the disputed adverse employment action element.

action. Henry maintains, and the court of appeals agreed, that a reasonable juror could conclude that she suffered an adverse employment action in the form of constructive discharge. *See id.* We turn to that issue now, first addressing the elements of constructive discharge and then applying the framework to Henry's age-based disparate treatment claim.

A.

In the limited number of cases when we have discussed the concept of adverse employment actions, we have generally followed federal law and required plaintiffs to demonstrate "some tangible change in duties or working conditions" that leads to "some material employment disadvantage." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010). "[M]inor changes in working conditions are insufficient." *Id.*; *see also Kerns v. Cap. Graphics, Inc.*, 178 F.3d 1011, 1016–17 (8th Cir. 1999) (explaining that "[m]inor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action"). Examples such as "[t]ermination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard, as [are] circumstances amounting to a constructive discharge." *Kerns*, 178 F.3d at 1016 (internal citation omitted); *see also Thompson v. Bi-State Dev. Agency*, 463 F.3d 821, 825 (8th Cir. 2006) ("Just like any other discharge, a constructive discharge is an adverse employment action.").

Henry maintains that she satisfies the adverse employment action element of her disparate treatment claim because she was constructively discharged. "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of

unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). Without addressing the merits of Henry's constructive discharge claim, we agree with federal courts and with Henry that a plaintiff can satisfy the adverse employment action element of a disparate treatment claim under the Human Rights Act by demonstrating constructive discharge.

Our court has had few opportunities to discuss constructive discharge beyond general principles, but we have previously described constructive discharge as requiring: (1) objectively intolerable working conditions that are (2) created by the employer with the intention of forcing the employee to quit. *See Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 32 (Minn. 2002). We have not, however, discussed these elements in detail. We now take this opportunity to do so, and address each of these elements in turn.

1.

We first turn to the element of objectively intolerable working conditions, including whether those conditions must be connected to an assertion of a hostile work environment to establish a constructive discharge under the Human Rights Act. Though we are not bound by federal law in our application of the Human Rights Act, *see Kenneh*, 944 N.W.2d at 231, it provides a useful starting point given our limited case law on constructive discharge. And we agree at the outset with federal courts that the test is an objective one: constructive discharge arises when the "working conditions [are] so intolerable that a *reasonable person* would have felt compelled to resign." *Suders*, 542 U.S. at 147 (emphasis added).

The requisite intolerability in working conditions necessary to establish a constructive discharge is circumstance-specific and, importantly, will vary depending on the underlying theory. The School District maintains that Henry can establish constructive discharge only if she can prove that she quit due to intolerable working conditions arising from a hostile work environment. Because Henry's hostile work environment claim fails, the School District argues, her constructive-discharge-based disparate treatment claim must fail too. But hostile work environment claims are distinct from disparate treatment claims, and as noted above, we analyze them differently. *Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 71 n.5 (Minn. 2020); *see also Winspear v. Cmty. Dev. Inc.*, 574 F.3d 604, 607 (8th Cir. 2009) (recognizing that constructive discharge and hostile work environment claims are "wholly distinct causes of action" with "different elements").

While both disparate treatment and hostile work environment claims require some action that is related to the plaintiff's protected status, the difference is in the form of the workplace conduct. A disparate treatment claim is based on *differential treatment* due to a plaintiff's protected status, while a hostile work environment claim is based on *harassing conduct* due to a plaintiff's protected status. This distinction is why some courts have "disallowed hostile work environment claims which are really recast claims of disparate treatment." *Schweizer v. City of Phila.*, Civ. A. No. 17-5388, 2019 WL 2950127, at *9–10 (E.D. Pa. July 9, 2019) (collecting cases from Delaware and Pennsylvania federal district courts). Consider, for example, a female employee alleging that she was passed over for a promotion in favor of a less-experienced male employee, or a black employee alleging that he was not offered the same opportunity to work overtime as his white coworkers because

of his race. Neither have necessarily suffered harassment, but both have experienced discrimination that affects the terms, conditions, and privileges of employment. Accordingly, though plaintiffs alleging constructive discharge based on disparate treatment or hostile work environment must always demonstrate working conditions that warrant quitting, the discriminatory workplace conduct that catalyzes resignation will differ depending on the underlying theory because the theories aim to address different forms of discrimination.

A plaintiff alleging constructive discharge due to a hostile work environment must prove that she quit due to intolerable harassment that satisfies the severe-or-pervasive standard. *See Kenneh*, 944 N.W.2d at 230–31. In other words, she must allege an "aggravated" case of hostile work environment, where harassment was so severe or pervasive that a reasonable person would have felt compelled to resign—"harassment ratcheted up to the breaking point." *Suders*, 542 U.S. at 147–48. A plaintiff alleging constructive discharge based on *disparate treatment*, however, may not have experienced harassment that "contaminates the psychological aspects of the workplace," but has still suffered illegal discrimination in the form of unfavorable treatment based on her protected status. *Lampkins v. Miltra QSR KNE, LLC*, 383 F. Supp. 3d 315, 330 (D. Del. 2019) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–67 (1986)). Requiring such plaintiffs to satisfy the requirements of a hostile work environment claim would improperly blur the distinctions between both the elements that underpin each cause of action and the kinds of harm each cause of action is intended to address.

The School District's position—namely, that Henry's constructive discharge claim is inextricably intertwined with her hostile work environment claim—is flawed because it fails to recognize this distinction and mischaracterizes Henry's claim. The School District suggests there is only one type of constructive discharge—one that arises from a hostile work environment. But this position is based on too narrow a reading of the U.S. Supreme Court's decision in *Suders*. In that case, which involved allegations of workplace sexual harassment resulting in constructive discharge, the Court explained that hostile-environment constructive discharge claims require a plaintiff to prove a hostile work environment "so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147. The Court noted, however, that the case concerned an employer's liability for "one subset" of constructive discharge claims—that is, hostile-work-environment-based constructive discharge claims, which the Court described as a "compound claim." *Id.* at 143, 147. The School District's characterization of *Suders* as merging hostile work environment requirements into *all* constructive discharge claims—including Henry's—is unpersuasive because there are other types of constructive discharge, including those resulting from disparate treatment.

Thus, we hold that the objectively intolerable conditions necessary to support a constructive discharge based on disparate treatment are not necessarily the same as those required to support a constructive discharge based on a hostile work environment. The requisite objectively intolerable conditions for a constructive discharge based on disparate treatment can occur "[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns."

E.E.O.C. v. Univ. of Chi. Hosps., 276 F.3d 326, 332 (7th Cir. 2002). In other words, a disparate-treatment-based constructive discharge can occur where, due to the employer's illegal discrimination in the form of unfavorable treatment based on the employee's protected status, "the handwriting [is] on the wall and the axe was about to fall." *Id.* (citation omitted) (internal quotation marks omitted). In such circumstances, an employee facing disparate treatment based on her protected status "would not be acting unreasonably if [she] decided that to remain with [her] employer would necessarily be inconsistent with even a minimal sense of self-respect, and therefore intolerable." *Hunt v. City of Markham*, 219 F.3d 649, 655 (7th Cir. 2000).

2.

Next, our reference to the constructive discharge standard in prior cases also included the requirement that plaintiffs making a claim of constructive discharge demonstrate that the employer's actions were intended to force the employee to quit. *Navarre*, 652 N.W.2d at 32. Some federal courts that require employer intent permit plaintiffs to prove the element by showing that the employee's resignation was a "reasonably foreseeable consequence of the employer's discriminatory actions." *Phillips v. Taco Bell*, 156 F.3d 884, 890 (8th Cir. 1998).

To the extent we have not done so expressly in prior cases, we adopt this employer-intent requirement and hold that a plaintiff alleging disparate-treatment-based constructive discharge under the Human Rights Act may satisfy this requirement in one of two ways: (1) by demonstrating that the employer deliberately created intolerable working conditions with the intent of forcing the employee to quit, or (2) by demonstrating that resignation

was a reasonably foreseeable consequence of the employer's deliberate actions. Requiring employer intent keeps constructive discharge on par with actual discharge as an adverse employment action. *See Suders*, 542 U.S. at 141.

Because we adopt the employer-intent requirement, we decline to require, as the district court did here, that plaintiffs alleging disparate-treatment-based constructive discharge notify their employers of the intolerable conditions or otherwise attempt to mitigate the alleged mistreatment before resigning. The district court granted summary judgment for the School District on the basis that Henry had failed to give the School District a reasonable chance to remedy the alleged mistreatment. In reaching this conclusion, the district court relied on precedent from the 8th Circuit holding that a plaintiff may not prevail on a constructive discharge claim if she "quits without giving [her] employer a reasonable chance to work out a problem." *Blake*, 870 F.3d at 826 (citation omitted) (internal quotation marks omitted). But the case relied upon by the district court was a sexual harassment case in which the employee "never told anyone there was a problem in need of fixing." *Id.* As a result, the employee was unable to show any intent to force her to quit, or that resignation was a reasonably foreseeable consequence.

A claim of constructive discharge based on disparate treatment, however, is different. We decline to adopt a mitigation requirement in cases of constructive discharge based on disparate treatment because it is inconsistent with our employer-intent requirement. When an employer is intentionally trying to get rid of an employee, it makes little sense to also require that employee to give the employer a chance to work out the problem. In such circumstances, requiring an employee to notify the employer and try to

resolve the situation before quitting will often be an exercise in futility that serves only to create an extra obstacle to the employee's recovery (as reflected in the summary judgment order here). We therefore decline to impose a mitigation requirement on plaintiffs claiming disparate-treatment-based constructive discharge. And to the extent such a mitigation requirement has been adopted by certain federal courts,[6] we emphasize again that we are not bound by federal law in our application of the Human Rights Act. *Kenneh*, 944 N.W.2d at 231.

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[6] The Eighth Circuit has also referred to the same requirement "that an employee is not constructively discharged if she quits without giving her employer a reasonable chance to work out a problem" in a case involving allegations of pregnancy discrimination. *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 460 (8th Cir. 2011) (citation omitted) (internal quotation marks omitted) (alteration omitted). In that case, the plaintiff quit on the last day of her pregnancy-related medical leave and later filed a pregnancy-related constructive discharge claim under federal law, "assert[ing] that after Wells Fargo learned that she was pregnant, her supervisors made impossible attendance demands with the intention of making her quit." *Id.* at 459. The court cited the employee's failure to "ma[k]e any attempt to work out her concerns with Wells Fargo about maternity leave or [her supervisor's] attendance demands" in support of the determination that "she has failed to show that Wells Fargo intended to force her to quit or that it could have reasonably foreseen that she would do so." *Id.* at 460–61. But the claim did not fail on that basis alone. Instead, the court found that the requirement to establish constructive discharge was not met because "[t]he record instead reflects that while [the employee] was on her first pregnancy related leave, her supervisors and HR decided to seek assistance from Wells Fargo's Work*Ability* program to explore possible accommodations for her absences." *Id.* at 460. The court concluded that "[t]his shows an intent to *maintain* an employment relationship with [the employee], not to cause her to quit." *Id.* (emphasis added). We do not dispute that an effort by the employee at mitigation may be *relevant* to whether the employer "intended to force her to quit or that it could have reasonably foreseen that she would do so." *See id.* But what we hold is that an employee's failure to engage in such mitigation is not fatal to establishing a disparate treatment constructive discharge claim when the employee can otherwise demonstrate that the employer deliberately created intolerable working conditions with intent to force the employee to quit, or that resignation was a reasonably foreseeable consequence of the employer's deliberate actions.

We stress that the type of disparate-treatment-based constructive discharge we recognize today contains an objective component. Constructive discharge occurs only when an employee shows that she was forced to resign when a *reasonable person* would agree that her employer's discriminatorily motivated actions, and her working conditions, had become unbearable.[7] *Suders*, 542 U.S. at 147. This could include situations where an employment environment becomes unbearable to a reasonable employee because the employer has made it clear that the employee had reached the end of the line—in other words, "the handwriting [was] on the wall," and the employee quit "just ahead of the fall of the axe." *Lindale v. Tokheim Corp.*, 145 F.3d 953, 956 (7th Cir. 1998). But a working condition does not become intolerable or unbearable merely because "a prospect of discharge lurks in the background." *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d. 331, 333 (7th Cir. 2004). Employees who quit for subjective reasons—that is, motivations other than a reasonable belief, stemming from disparate treatment, that firing is an "imminent

[7] We emphasize that the employer-intent requirement of constructive discharge in the disparate treatment context does not require an employee to show the employer's actions were motivated by discrimination. This is because a prima facie case for disparate treatment already separately requires the employee to show that the circumstances give rise to an inference of discrimination. *See Dietrich*, 536 N.W.2d at 323–24; *Feges*, 483 N.W.2d at 711; *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 637 (8th Cir. 2011). It would be duplicative to require an employee to present evidence of an employer's discriminatory purpose for both the adverse employment action element—which constructive discharge can satisfy—*and* the inference of discrimination element. The School District does not contest the court of appeals' conclusion that the circumstances gave rise to an inference of age discrimination—the School District only challenges that Henry satisfied the adverse employment action element of a prima facie case by demonstrating she was constructively discharged. Accordingly, we accept the court of appeals' conclusion on the inference of discrimination element and focus on the employer's intent only as it relates to forcing the employee to quit.

and inevitable event"—cannot successfully claim constructive discharge. *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 680 (7th Cir. 2010); *see also Judge v. Shikellamy Sch. Dist.*, 905 F.3d 122, 125 (3d Cir. 2018) (explaining that, in evaluating whether a constructive discharge occurred, "the ultimate issue is not what [the plaintiff] herself felt or believed, but whether a reasonable person under the circumstances 'would have felt compelled to resign' " (quoting *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010))); *Yearous v. Niobrara Cnty. Mem'l Hosp. By & Through Bd. of Trs.*, 128 F.3d 1351, 1356 (10th Cir. 1997) (stating that for purposes of determining whether a constructive discharge occurred, "[a] plaintiff's subjective views of the situation are irrelevant").

B.

Having determined how a plaintiff can establish constructive discharge under a disparate treatment theory, the remaining issue is whether a reasonable juror could conclude that Henry has done so here.

Through supervisor Zuker's deposition testimony, Henry presented evidence which, when viewed in the light most favorable to her, demonstrates that School District management took a number of deliberate steps calculated to make Henry's working environment unbearable so that she would resign. Specifically, School District management (1) initiated three performance evaluations of Henry in less than a year, even though a performance evaluation had not been completed for approximately 2 years; (2) exaggerated Henry's trivial performance issues and used the exaggerated issues to support disciplinary action; (3) placed Henry on an unachievable PIP intended to cause her to resign or be terminated; (4) issued a written letter threatening to terminate Henry if she did not

accomplish the goals set out in the PIP; (5) reprimanded Henry for conduct more harshly than other employees; (6) denied Henry the opportunity to attend a training session; (7) made comments that the problems within the department were because people "are too old" and permitted Davis to create an environment where employees were reluctant to report discriminatory conduct for fear of retaliation; and (8) made comments saying that long-term employees near retirement should "consider retirement and travel like his parents."

As established above, an employee alleging constructive discharge under a disparate treatment theory must demonstrate that she resigned to escape objectively intolerable working conditions created by the employer with the intent of forcing the employee to quit. An employee may satisfy the employer-intent requirement by demonstrating either that the employer deliberately created intolerable working conditions with intent to force the employee to quit, or that resignation was a reasonably foreseeable consequence of the employer's deliberate actions.

Applying this test to these facts and viewing them in the light most favorable to Henry, we conclude that her constructive discharge claim survives summary judgment because "reasonable persons might draw different legal conclusions from the evidence presented." *Kenneh*, 944 N.W.2d at 228. First, Henry must present evidence that the School District acted in a manner calculated to make her resign. Zuker testified that Deputy Chief Davis instructed her to place Henry on a PIP and ensure she was "out by May" so that the department could rehire. This evidence demonstrates an intent on the part of the School District to force Henry to quit. Testimony from other School District managers

who supervised Henry and described the PIP as unnecessary and unachievable is further evidence of the School District's intent to force Henry to quit.

Second, under the standard articulated above for constructive discharges based on disparate treatment, Henry has provided evidence that her working conditions were objectively intolerable. A jury could find that a reasonable person faced with an unachievable PIP based on performance reviews consisting of trivial and exaggerated allegations would feel compelled to resign, particularly after receiving a letter explaining that termination was being considered. This conclusion is especially true given the sudden and extreme change in the tenor of Henry's performance evaluations—she had not received a negative performance review in the nearly 20 years she had been working for the School District but was suddenly being reprimanded for things as minor as clocking in a minute late. The handwriting was on the wall for Henry, and taken as true, Zuker's testimony suggests that Henry was going to be fired no matter what. Given that reality, Henry understood that her "choice [was] to either accept termination and have that on [her] employment record or have retirement as [her] status." A jury could conclude that it was not unreasonable given those circumstances for an employee in Henry's position to retire rather than have a termination on her employment record.

To be clear, the act of placing an employee on a PIP alone does *not* establish de facto grounds for a constructive discharge claim. As stated in a memorandum of agreement between the School District and Henry's union, "individual improvement plans are an appropriate method through which to identify job-related performance areas of concerns and provide an opportunity for employees to improve performance." We emphasize that

the placement of an employee on a PIP does not, by itself, constitute an adverse employment action, particularly when the PIP is "reasonable" and/or "minimally onerous." *See Bernard v. St. Jude Med. Ctr. S.C., Inc.*, 398 F. Supp. 3d 439, 461–62 (D. Minn. 2019); *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1173 n.3 (10th Cir. 2018) (compiling circuit court case law). But Henry has presented sufficient probative and non-speculative evidence from former supervisors and coworkers that her PIP was neither reasonable nor minimally onerous.

In *Fischer v. Anderson Corp.*, for example, the Eighth Circuit explained that a PIP could amount to constructive discharge if the employee produces evidence that the PIP was "setting [the plaintiff] up to fail" or was filled with unreasonable requirements. 483 F.3d 553, 557–58 (8th Cir. 2007). The court was careful to note that to withstand summary judgment, the nonmoving party must substantiate allegations with sufficient probative evidence that would permit a finding in her favor based upon more than mere speculation, conjecture, and fantasy, and that an employee does not meet that standard by pointing to another employee's "facially impossible to perform PIP" when his PIP was "otherwise reasonable." *Id.* at 557 n.6.

We agree with the *Fischer* court that an employee alleging constructive discharge based on a PIP cannot simply rely on the mere existence of the PIP to prove her claim. But Henry's argument that the PIP was setting her up to fail is not based on mere speculation, conjecture, or fantasy. It is based on direct testimony from her supervisor, who was instructed by the Deputy Chief of the division, to exaggerate issues in Henry's performance reviews, "pile on the work," and shorten deliverable dates to make her projects impossible

to complete—all for the purpose of getting rid of her. *See Perret v. Nationwide Mut. Ins. Co.*, 770 F.3d 336, 339 (5th Cir. 2014) (indicating that evidence showing that termination was "inevitabl[e]" after an employee was placed on PIPs could support a conclusion that the employer's use of PIPs created a situation in which a reasonable employee would have felt compelled to resign). Viewed in the light most favorable to Henry, a reasonable jury could find that her PIP and the circumstances surrounding it amount to constructive discharge.

Based on this evidence, we conclude Henry has established a genuine issue of material fact as to whether she suffered an adverse employment action in the form of constructive discharge. We therefore affirm the court of appeals and remand to the district court.[8]

It may seem incongruous to conclude that Henry's work environment was sufficiently intolerable to support her constructive-discharge-based disparate treatment claim but not sufficiently offensive and hostile to support her hostile work environment claim. But we note again that there is an important distinction between a disparate treatment claim (of which constructive discharge can be a part) and a hostile work environment claim. Thus, it is possible to conclude, as we did above, that Henry failed to present sufficient evidence of age-based harassment causing a hostile work environment

[8] Because Henry has presented sufficient evidence that she suffered a disparate-treatment-based constructive discharge independent of her hostile work environment claim, we need not reach the related issue, raised by the School District, of whether the affirmative defense that we adopted in *Frieler*, 751 N.W.2d 558, should apply "in the age-based hostile-work-environment context" and to "age-based hostile-work-environment constructive-discharge claims."

while also concluding here that a jury could find the School District's age-based differential treatment created intolerable working conditions that led to her reasonable decision to quit.

III.

Finally, we turn to the court of appeals' alternative determination that there is a genuine issue of material fact as to "whether Henry suffered an adverse employment action based on the cumulative evidence she submitted." *Henry*, 964 N.W.2d at 679. Analyzing Henry's disparate treatment claim, the court of appeals stated:

> [T]he concept of an adverse employment action is broader than proof of discharge or constructive discharge, and may also be proved if an employee presents evidence that, when considered cumulatively, could lead a reasonable juror to conclude that she suffered "a tangible change in working conditions that produces a material employment disadvantage."

Id. at 678 (quoting *Spears*, 210 F.3d at 853).

This statement from the court of appeals suggests that Henry can satisfy the adverse employment action element of a prima facie case of disparate treatment employment discrimination under the Human Rights Act under a cumulative effects theory. We have never discussed, much less adopted, a cumulative effects theory. This theory would permit plaintiffs to establish an adverse employment action based on the aggregation of discrete acts that would not otherwise amount to a constructive discharge or would not otherwise be actionable if considered in isolation. *See Abel*, 947 N.W.2d at 71 n.5 (distinguishing discrimination claims based on discrete acts from hostile work environment claims); *Watson v. McDonough*, 996 F.3d 850, 856 (8th Cir. 2021) (declining to aggregate individual events "to find an adverse employment action"). Under the circumstances of this case, where Henry has not persuasively argued that the court should adopt this type of

theory, we decline to adopt the court of appeals' expansion of "the concept of an adverse employment action" under the Human Rights Act. *Henry*, 964 N.W.2d at 678.

We reverse the court of appeals' determination that Henry satisfied the adverse employment action element of a disparate treatment claim under a cumulative effects theory.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals in part and reverse in part.

Affirmed in part and reversed in part.

C O N C U R R E N C E & D I S S E N T

ANDERSON, Justice (concurring in part, dissenting in part).

In her complaint, Barbara Henry alleged a single count of age-based employment discrimination against Saint Paul Public Schools (School District) under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01–.50 (2022). From the single count in the complaint, the court reads both a disparate treatment claim and a hostile work environment claim. I agree with the court that the record does not support Henry's claim that the School District created a hostile work environment. And I agree with the court that there is no cumulative effects theory that could support a disparate treatment claim. But I disagree with the court's conclusion as to Henry's disparate treatment claim based on her alleged constructive discharge. I would therefore affirm in part and reverse in part the decision of the court of appeals and affirm the district court's grant of summary judgment in favor of the School District.

The court holds that Henry presented sufficient evidence to establish a prima facie case of disparate-treatment age discrimination because she was constructively discharged. It determines that the constructive discharge satisfies the adverse employment action prong of Henry's prima facie discrimination case—even though Henry alleged that she was constructively discharged as a result of a hostile work environment and the court rejects Henry's hostile work environment claim. In presenting her case to the district court, Henry asserted that she was constructively discharged because the School District created a hostile work environment. In holding that Henry's constructive discharge is separate from her hostile work environment claim, the court relies upon a theory that she never pleaded

to the district court and improperly concludes that such a theory must go to a jury. For that reason, I respectfully dissent.

Henry stated in her complaint that the actions of the School District "created a hostile work environment that was severe and pervasive, which required [her] to be constructively discharged." And when laying out the actions of the School District that "were so severe or pervasive" so as to create a hostile work environment, she specifically listed the constructive discharge as one of those actions. She used the same facts and arguments supporting her hostile work environment claim to support her constructive discharge claim. Accordingly, Henry asserted to the district court multiple times that she was constructively discharged *because* of the hostile work environment the School District created, tying the two claims together.

The court concludes that this case does not present a hostile-work-environment constructive discharge claim and reasons instead that Henry's claim falls into a different "subset" of constructive-discharge employment discrimination claims that do not rely on a hostile work environment. *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004). In doing so, the court holds that there are certain claims in which a plaintiff need not prove the existence of a hostile work environment to prove that she was constructively discharged. But Henry alleged here that she was constructively discharged *because of* the hostile work environment the School District created.

Although we have never explicitly addressed what is required to prove constructive discharge that resulted from a hostile work environment, the Supreme Court's explanation of the concept in *Suders*, 542 U.S. at 143–49, is instructive here. *See generally Cont'l Can*

Co. v. State, 297 N.W.2d 241, 246 (Minn. 1980) (stating that the court has applied "[p]rinciples developed in Title VII cases by federal courts" when construing the Minnesota Human Rights Act), *superseded by statute*, Act of Mar. 23, 1982, ch. 619, §§ 2–3, 1982 Minn. Laws 1508, 1511, *as recognized in Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564–65 (Minn. 2008). The Supreme Court explained that when a plaintiff claims "constructive discharge resulting from" a hostile work environment, the hostile work environment claim is a "lesser included component" of the constructive discharge. *Suders*, 542 U.S. at 143, 149. "Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case." *Id.* at 149. That is because a constructive discharge based on a hostile work environment "presents a 'worse case' harassment scenario, harassment ratcheted up to the breaking point," or "harassment so intolerable as to cause a resignation." *Id.* at 147–48.

The court concedes that "Henry's complaint does assert a single count of age discrimination," but because we construe pleadings in civil-rights cases liberally and the district court and court of appeals considered both theories, the court concludes that both the age discrimination claim based on disparate treatment and the age discrimination claim based on a hostile work environment are properly before the court. *See supra* at 17 n.3. But in this state, appellate courts have the power to "take any . . . action as the interest of justice may require." Minn. R. Civ. App. P. 103.04. Appellate courts also have the responsibility to " 'decide cases in accordance with law,' " which is " 'not to be diluted by counsel's . . . failure to specify issues or to cite relevant authorities.' " *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) (quoting *Moorhead Econ. Dev. Auth. v. Anda*,

789 N.W.2d 860, 875 (Minn. 2010)). In this court's own de novo review of the complaint and record in this case, *see Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020), the court should therefore apply the correct legal standard and decline to address two separate claims when Henry's complaint alleged only one.

Moreover, even if the two separate theories were properly litigated and correctly before this court, Henry's disparate treatment claim based on a constructive discharge would, in my view, also fail. To prove a constructive discharge, the plaintiff must demonstrate (1) objectively intolerable working conditions (2) created by the employer with the intention of forcing the employee to quit. *See Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 32 (Minn. 2002). I disagree with the court's conclusion that Henry presented sufficient evidence for a jury to reasonably conclude that the School District intentionally created intolerable working conditions or that Henry's resignation would be a reasonably foreseeable consequence of its actions. *See supra* at 29-34. In reaching its conclusion on whether Henry's working conditions were objectively intolerable, the court cites the initiation of performance evaluations, Henry's placement "on an unachievable PIP [performance improvement plan]," the issuance of a letter threatening to terminate Henry if she did not accomplish the goals in the PIP, reprimands Henry received, the School District's refusal to allow Henry to attend training sessions, and comments that "problems within the department were because people 'are too old' " or that long-term employees should "consider retirement." *Supra* at 29-30. But as the court points out, an employee cannot support a constructive discharge merely because it is "facially impossible" when it is "otherwise reasonable." *Fischer v. Anderson Corp.*, 483 F.3d 553, 557 n.6

(8th Cir. 2007). And the alleged discriminatory comments and other factual assertions do not support a showing of "underlying illegality" related to the PIP sufficient to overcome summary judgment in favor of the School District. *See Huyen v. Driscoll*, 479 N.W.2d 76, 81 (Minn. App. 1991), *rev. denied* (Minn. Feb. 10, 1992). As the Eighth Circuit concluded in *Handenburg v. Principal Mut. Life Ins. Co.*, although these facts are troubling and "no doubt made work less enjoyable . . . and might have induced stress for [Henry], there is simply not enough evidence to support a finding that her supervisors' conduct created the compulsion to quit that is necessary for a constructive discharge." *See* 118 F.3d 570, 575 (8th Cir. 1997).

Although the discussion above sufficiently explains why the School District was entitled to summary judgment, I would also hold that the affirmative defense we adopted in *Frieler* applies to such age discrimination claims based on a constructive discharge resulting from a hostile work environment, so the School District would have additionally been entitled to the *Frieler* affirmative defense had the case proceeded to trial on that claim. In *Frieler*, we held that in the context of a supervisor sexual harassment claim where there is no tangible employment action against an employee, an employer may raise an affirmative defense to a hostile work environment claim by proving "(1) 'that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' and (2) 'that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.' " 751 N.W.2d at 571 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)).

The United States Supreme Court has explained that "[a] constructive discharge involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. In the case of a hostile work environment, "[t]he former involves no official action," whereas "the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action." *Id.* When harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment," the *Ellerth*/*Faragher* affirmative defense we recognized in *Frieler* is unavailable to employers. *See Suders*, 542 U.S. at 137 (citation omitted) (internal quotation marks omitted).

Here, Henry voluntarily left her employment with the School District. Henry has failed to demonstrate that her departure was precipitated by an official act by the School District, other than Henry's placement on a PIP, which alone is insufficient to constitute an adverse employment action, *see Bernard v. St. Jude Med. Ctr. S.C., Inc.*, 398 F. Supp. 3d 439, 461–62 (D. Minn. 2019), and falls short of a tangible employment action "such as discharge, demotion, or undesirable reassignment," *Suders*, 542 U.S. at 137 (citation omitted) (internal quotation marks omitted). The testimony of at least one other employee casts some doubt on the legitimacy of the PIP, but even so, that makes it, in my view, merely "less certain" that "the supervisor's misconduct has been aided by the agency relation," so there is justification in "affording the employer the chance to establish, through the *Ellerth*/*Faragher* affirmative defense, that it should not be held vicariously liable." *Suders*, 542 U.S. at 148–49. Although the court notes that "[w]hen an employer is intentionally trying to get rid of an employee, it makes little sense to also require that

employee to give the employer a chance to work out the problem," *see supra* at 26, it is less clear here that any *employer*-sanctioned misconduct has occurred. Applying the *Frieler* defense to age discrimination claims based on a hostile work environment constructive discharge encourages conciliation rather than litigation against employers who may or may not have had reason to know of the misconduct of a particular supervisor or group of supervisors.

Accordingly, because Henry has alleged a constructive discharge based on a hostile work environment, but no hostile work environment existed, summary judgment for the School District was appropriate. I further conclude that the School District would have had recourse to the *Frieler* affirmative defense for such an age discrimination claim based on a constructive discharge resulting from a hostile work environment. I therefore would affirm in part and reverse in part the decision of the court of appeals and affirm the district court's grant of summary judgment in favor of the School District.

GILDEA, Chief Justice (concurring in part, dissenting in part).

I join the concurrence in part and dissent in part of Justice Anderson.