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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1956**

In re the Marriage of:  
Kevin Nickolas Toboleski, petitioner,  
Appellant,

vs.

Ann Marie Toboleski,  
Respondent.

**Filed December 14, 2010  
Affirmed  
Wright, Judge  
Concurring specially, Stoneburner, Judge**

Carlton County District Court  
File No. 09-F3-01-000078

Keith M. Carlson, Keith M. Carlson Law Firm, Cloquet, Minnesota (for appellant)

Timothy N. Downs, The Downs Law Firm, Duluth, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Stoneburner, Judge; and  
Wright, Judge.

**UNPUBLISHED OPINION**

**WRIGHT**, Judge

Appellant-husband challenges the district court's denial of his motion to terminate his spousal-maintenance obligation to respondent-wife. He contends that the district court erred by finding that husband retired from his employment in bad faith and by

failing to consider whether changed circumstances rendered spousal maintenance unfair and unreasonable. He also challenges the district court's denial of his motion for amended findings and discovery. We affirm.

### **FACTS**

The marriage of appellant-husband Kevin Toboleski and respondent-wife Ann Marie Toboleski was dissolved on April 5, 2002, by judgment and decree. At the time of the dissolution, husband was employed as a firefighter. Wife was unemployed and suffered from medical conditions that limited her ability to work. In the decree, husband stipulated that wife needed spousal maintenance to be awarded indefinitely. The district court awarded wife permanent monthly spousal maintenance in the amount of \$500 and 50 percent of the marital portion of husband's pension, to be received when the funds became payable to husband on his retirement. By 2009, husband's monthly spousal-maintenance obligation was \$543 as a result of cost-of-living adjustments.

On May 12, 2009, in anticipation of his upcoming retirement on August 1, 2009, husband, who was then age 49, moved for an order terminating his spousal-maintenance obligation. Husband indicated that he was retiring because his pension's penalty for retiring before age 55 had been reduced since the divorce, and he suffered from "wear and tear" on his body and asthma, which was aggravated by smoke inhalation. Wife opposed husband's motion, arguing that husband's retirement was voluntary and early because, at the time of the dissolution, the parties contemplated that he would retire at age 55.

The district court heard the motion on June 4, 2009. In her memorandum of law,<sup>1</sup> wife alleged that husband's early retirement was in bad faith. At the hearing, husband argued that he was not retiring in bad faith and alluded to the retirement penalty change as his reason for retiring at age 50. Wife countered that husband's retirement was a voluntary, bad-faith attempt to change his circumstances to avoid his spousal-maintenance obligation. Her counsel also described at length the detrimental financial consequences to wife of husband's early retirement.

The district court denied husband's motion, finding that husband's retirement was early, voluntary, and in bad faith. The district court reasoned that the parties' expectation when they divorced was that husband would retire no earlier than age 55 and that husband did not present evidence of health conditions preventing him from full-time employment or any managerial policy influencing his decision. Because it concluded that husband's changed circumstances were created in bad faith, the district court declined to address whether the maintenance award is unreasonable and unfair.

Shortly thereafter, husband served wife with discovery requests regarding her medical and financial status. Husband next moved for amended findings of fact and conclusions of law and for an evidentiary hearing. In support of his motion, he submitted documents relating to his pension benefits and his medical records.

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<sup>1</sup> The date on which the district court received wife's memorandum is not clear from the record. The memorandum indicates that it was signed by wife's attorney on June 2, 2009, and an accompanying affidavit of mailing indicates that it was mailed to husband's attorney on that date. Wife's attorney referred to the memorandum at the June 4 hearing on husband's motion to terminate spousal maintenance.

At a hearing on the motion for amended findings, husband argued that an evidentiary hearing was necessary on the issue of whether he retired in bad faith. He maintained that the documents requested in discovery were needed for the evidentiary hearing. The district court denied husband's motion for amended findings and additional discovery. This appeal followed.

## DECISION

### I.

A district court has broad discretion when deciding whether to modify a spousal-maintenance award. *Kielley v. Kielley*, 674 N.W.2d 770, 775 (Minn. App. 2004). We will not disturb the district court's decision absent an abuse of that discretion. *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). "A district court abuses its discretion when its decision is against logic and the facts on record." *Kielley*, 674 N.W.2d at 775 (quotation omitted).

A party seeking to modify a spousal-maintenance award must demonstrate that there has been a substantial change in circumstances that renders the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2008); *Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn. 1997). A substantial increase or decrease in the income or expenses of either party is sufficient to show changed circumstances. Minn. Stat. § 518A.39, subd. 2(a).

When an obligor voluntarily creates a change of circumstances, the district court considers the obligor's motives. *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 717 (Minn. App. 2009) *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn.

Feb. 1, 2010); *In re Marriage of Richards*, 472 N.W.2d 162, 164 (Minn. App. 1991). “If the change was made in good faith, then the obligee should share in the hardship as if the parties had remained together.” *Richards*, 472 N.W.2d at 165. But when an obligee raises a colorable claim of bad faith, an obligor must establish by a preponderance of the evidence that the decision to retire early was not influenced primarily by the specific intent to decrease or terminate spousal maintenance. *Id.* When determining whether an obligor’s early retirement is in bad faith, courts consider several factors. These factors include the obligor’s health and employment history, the parties’ expectations at the time of the dissolution regarding early retirement, the employer’s retirement policies and benefits, and the prevailing economic conditions at the time of retirement. *Id.*

The district court found that husband’s retirement was early, voluntary, and in bad faith. Husband specifically challenges the district court’s findings that he retired in bad faith and failed to demonstrate changed circumstances, which led the district court to conclude that it need not consider whether changed circumstances rendered his maintenance obligation unreasonable and unfair. We will not disturb these findings of fact unless we conclude that they are clearly erroneous. Minn. R. Civ. P. 52.01; *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1993). Findings of fact are clearly erroneous when they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

Husband concedes the early-retirement finding, and the parties do not dispute that husband’s retirement was voluntary. Therefore, our review is limited to whether the

district court's finding of bad faith was clearly erroneous. The district court found that wife raised a colorable claim of bad faith, which shifted the burden to husband to establish by a preponderance of the evidence that his decision to retire early was not primarily influenced by a specific intent to decrease or terminate spousal maintenance. *See Richards*, 472 N.W.2d at 165. Husband cited health reasons and a changed retirement policy as his reasons for retiring. In considering whether husband adequately rebutted the bad-faith allegation, the district court considered several of the *Richards* factors. *See id.* (stating that district court should consider several factors, including obligor's health, employer policies, and parties' expectations when the marriage dissolved about early retirement). The district court found that husband presented evidence of neither current health problems preventing him from working full time nor any managerial policy that might have influenced his decision to retire. And the district court found that, at the time of the dissolution, the parties shared the expectation that husband would retire at age 55, if not later. Based on its consideration of these factors, the district court concluded that husband's early retirement would cause a bad-faith reduction in his income.

The district court's findings are amply supported by the evidence. Husband failed to submit evidence to support the health problems that he asserted in his affidavit, and he failed to assert that his medical condition prevents him from working as a firefighter or from obtaining other comparable, meaningful employment. The district court did not specifically address husband's explanations about the change in his pension terms. But because the pension's early-retirement penalty decreased by only six percent, the district

court's finding that husband's decision to retire was not influenced by any managerial policy was not manifestly contrary to the weight of the evidence.

Husband disputes the district court's finding that the parties' expectation when they divorced was that husband would retire no earlier than age 55. That finding, however, is based both on the decree, which states the estimated amount of the monthly benefit at age 55, and on husband's affidavit submitted shortly after the marriage dissolution. In the affidavit, husband acknowledged his obligation to designate wife as a beneficiary at retirement and stated that he did not "intend to apply for retirement until at least age 55, if not later." These references to husband's retirement at age 55 are more than sufficient support for the district court's finding as to the expectation of the parties at the time of the marriage dissolution. The district court properly considered husband's asserted motives for retiring. Its finding, with regard to husband's spousal-maintenance obligation, that husband retired early in bad faith is not clearly erroneous.

Husband also argues that the district court erred by not determining whether a change in circumstances rendered the original spousal-maintenance award unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(a) (requiring a showing that changed circumstances rendered the original award unreasonable and unfair). This argument is unavailing. "When a district court rejects the changed circumstances relied on by a moving party as created in bad faith, there is no need to address whether the award is unreasonable or unfair." *Hemmingsen*, 767 N.W.2d at 719; *see also Tuthill*, 399 N.W.2d at 232 (holding that when district court finds that appellant failed to establish changed circumstances, district court need not make findings on other statutory requirements).

Here, because the district court concluded that husband's changed circumstances were created in bad faith, it did not err by declining to consider the fairness and reasonableness of the maintenance award.<sup>2</sup>

In sum, the record supports the district court's finding that husband's early retirement was in bad faith. Accordingly, the district court did not abuse its discretion by denying husband's motion to terminate his spousal-maintenance obligation.

## II.

Husband also challenges the district court's denial of his motion for amended findings and its determination that an evidentiary hearing was not necessary.

Generally, a district court's denial of a motion for amended findings of fact is reviewed for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). "When considering a motion for amended findings, a district court 'must apply the evidence as submitted during the trial of the case' and 'may neither go outside the record, nor consider new evidence.'" *Id.* (quoting *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974)).

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<sup>2</sup> Even if the district court had concluded that husband established changed circumstances, husband failed to satisfy his burden of demonstrating that the spousal-maintenance award was unfair and unreasonable in light of those circumstances. The district court found that (1) husband's postretirement income would be higher than wife's; (2) husband's new spouse contributes to their monthly expenses; (3) husband did not assert that his medical condition prevents him from obtaining meaningful employment; (4) wife's job prospects and vocational skills remain limited because of her serious medical conditions; and (5) husband's retirement would cause wife's monthly expenses to increase because the cost of her health insurance would increase. These findings support the reasonable inference that, had it considered the issue on the merits, the district court would have concluded that husband failed to demonstrate that the spousal-maintenance award was unreasonable and unfair.

The decision to hold an evidentiary hearing generally rests within the district court's discretion. *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007). And in a dissolution matter, it is presumed that a noncontempt motion will be decided without an evidentiary hearing "unless the district court determines that there is good cause for a hearing." *Id.*; Minn. R. Gen. Pract. 303.03(d).

Husband contends that he did not request an evidentiary hearing before the district court issued its order because the district court's finding that husband retired in bad faith was "a complete shock and surprise." But wife alleged bad faith in her memorandum of law. And the record establishes that wife dedicated a portion of her argument at the June 4, 2009 hearing to the bad-faith allegation. Husband did not object to the presentation of these arguments. Rather, he briefly addressed the issue of bad faith in his argument before the district court. If husband was surprised by the bad-faith allegation and if he was not adequately prepared to present evidence to rebut it at the hearing on his motion to terminate spousal maintenance, he could have moved at that time for an evidentiary hearing or requested an opportunity to submit additional briefing. By failing to do so, he forfeited any later claim that bad faith was not timely alleged or that he lacked notice of the bad-faith allegation. *Cf.* Minn. R. Civ. P. 15.02 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.")

The district court was within its discretion to decide that a later evidentiary hearing was not necessary. And because the district court granted neither an evidentiary

hearing nor husband's motion for amended findings, the district court's denial of husband's discovery request also was proper.

**Affirmed.**

**Stoneburner, Judge (concurring specially)**

I concur in the result because I conclude that although the district court did not reach this issue, the record shows that husband did not establish that his voluntary early retirement made the current maintenance obligation unreasonable and unfair. I disagree with the majority, however, that this record supports the district court's determination that husband's retirement is in bad faith. Husband stated valid reasons for the change in his position on early retirement from the date of the marriage dissolution: the pension penalty for early retirement changed substantially and in the seven intervening years, husband had experienced "wear and tear" on his body and asthma, aggravated by smoke inhalation. Husband's testimony that physical changes affected his attitude toward early retirement did not require documentation to be credible, and nothing in the record refuted husband's claims about his physical condition. Common sense supports the conclusion that the combination of the reduced pension penalty and husband's increased awareness of the physical demands of firefighting could affect his retirement expectations. Husband should not be bound by retirement expectations he expressed under different circumstances in his early forties such that a change in attitude is equated with bad faith.