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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0462**

Frank Spencer, et al.,  
Appellants,

vs.

State of Minnesota,  
Department of Corrections,  
Respondent.

**Filed March 11, 2008  
Affirmed in part, reversed in part, and remanded  
Stoneburner, Judge**

Ramsey County District Court  
File No. C0055282

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Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stoneburner, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

In this appeal from summary judgment dismissing appellants' discrimination, retaliation, and reprisal claims against respondent, their state employer, appellants argue

that the district court erred by (1) concluding appellant Robinson's claims for discrete acts of discrimination are time-barred and (2) concluding that appellants failed to make a prima facie case of discrimination, retaliation, or reprisal on the remaining claims. Because the district court correctly applied the statute of limitations to appellant Robinson's claims for failure to transfer and correctly concluded that Spencer, Grant, and Robinson failed to make a prima facie case on non-time-barred claims, we affirm in part. Because appellant Ekereuke presented sufficient evidence to make a prima facie case of race or national-origin discrimination on her claim of failure to promote and raised material fact questions about respondent's rebuttal evidence, we reverse summary judgment on that claim and remand for further proceedings in the district court.

## **FACTS**

Appellants Frank Spencer, Doris Robinson, Ekaette Ekereuke, and Eddie Grant are current or former employees of respondent Minnesota Department of Corrections (the DOC) Lino Lakes facility (MCF – Lino Lakes) and Oak Park Heights facility (MCF – OPH). Appellants served a single complaint on the DOC on March 31, 2005, and an amended complaint on April 28, 2005, asserting individual claims of: (1) race discrimination in violation of the Minnesota Human Rights Act (MHRA); (2) aiding and abetting discrimination in violation of the MHRA; (3) violation of state constitutional rights; (4) intentional infliction of emotional distress; (5) defamation; (6) retaliation and reprisal; and (7) section 1983 violation. Appellants asserted discrete acts of race discrimination and claimed that those discrete acts, coupled with other incidents, supported a claim of discrimination in the form of a hostile work environment. Ekereuke,

whose national origin is Nigeria, also asserted a claim of national-origin discrimination. Spencer, who retired in December 2005, and Ekereuke, who quit her job with the DOC in November 2004, alleged that they were constructively discharged.

After discovery was completed, the DOC moved for summary judgment, and appellants moved to file a second amended complaint. The motions were heard together. At the hearing, appellants abandoned their claims for aiding and abetting discrimination, defamation, and section 1983 violation. The district court granted summary judgment to respondent on all of appellants' remaining claims and dismissed appellants' complaint with prejudice. The district court did not rule on appellants' motion to file a second amended complaint.

This appeal followed, in which appellants challenge only dismissal of their MHRA claims.

## **D E C I S I O N**

On appeal from summary judgment, this court “ask[s] two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

*Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). No genuine issue for trial exists when “the record taken as a whole could not lead a rational trier of

fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). “To forestall summary judgment, the nonmoving party must do more than rely on ‘unverified or conclusionary allegations’ in the pleadings or postulate evidence which might be produced at trial. The nonmoving party must present specific facts which give rise to a genuine issue of material fact for trial.” *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998) (quotation omitted).

Appellants assert that summary judgment should seldom be granted in employment-discrimination cases, but this proposition was rejected in *Dietrich v. Canadian Pac. Ltd.*, in which the supreme court “express[ed] [its] disapproval of the court of appeals’ sweeping statement that summary judgment is generally inappropriate in discrimination cases.” 536 N.W.2d 319, 326 n.9 (Minn. 1995).

## **I. MHRA claims**

Appellants allege various instances of discriminatory conduct in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.08 (2004). The MHRA provides that:

[I]t is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age to:

....

(c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Minn. Stat. § 363A.08, subd. 2. When interpreting cases under the MHRA, this court gives “strong weight to federal court interpretations of Title VII claims because of the substantial similarities between the two statutes.” *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999).

Appellants’ MHRA claims are analyzed under the burden-shifting analysis first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Sigurdson v. Isanti County*, 386 N.W.2d 715, 719-20 (Minn. 1986). Under this analysis, an employee alleging racial discrimination is first required to make a prima facie showing of discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 556 (Minn. 1996). If the employee meets that burden, the employer has the burden of producing evidence of a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. If the employer produces such evidence, the burden shifts back to the employee to show that the employer’s proffered reason was a pretext for unlawful discrimination and “that the employer intentionally discriminated against [the employee].” *Sigurdson*, 386 N.W.2d at 720.

The district court granted summary judgment to the DOC on all of appellants’ MHRA claims because it determined (1) that some of appellants’ claims of discrete acts of discrimination are time-barred and (2) appellants, as a matter of law, failed to make a prima facie showing of discrimination on their remaining claims because the DOC’s alleged conduct did not amount to an adverse employment action. Alternatively, the district court concluded that if appellants had established a prima facie case, the DOC had

rebutted the prima facie case as a matter of law, and appellants failed, as a matter of law, to show that the DOC's rebuttal evidence was pretextual.

**a. Robinson's claims for denied transfers were barred by statute of limitations**

Claims under the MHRA must be filed with the Minnesota Department of Human Rights (MDHR) or the district court within one year of the allegedly discriminatory conduct. Minn. Stat. § 363A.28, subd. 3 (2004). The one-year limitations period begins to run when the discriminatory act occurs, not "when the consequences of that act become most painful." *Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105, 107-08 (Minn. 1991).

In this case, any discrete acts of discrimination that occurred before March 31, 2004, are time-barred, although appellants could still recover for any acts of discrimination that are part of a violation that continues beyond March 31, 2004. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105, 122 S. Ct. 2061, 2068 (2002) (holding that Title VII limitation on actions "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory period," but "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period"); *see also Mems v. City of St. Paul*, 327 F.3d 771, 785 (8th Cir. 2003) (stating that "a discrete act occur[s] on the day that it happen[s] and constitutes its own unlawful employment practice") (quotation omitted). "Examples of discrete acts include

termination, failure to promote, denial of transfer, or refusal to hire.” *Mems*, 327 F.3d at 785 (quotation omitted).

Only Robinson challenges the district court’s dismissal of claims as time-barred. Robinson argues that because she was not granted a transfer until July 2004, and because her claim that she was denied the opportunity to “work out of class”<sup>1</sup> continued through 2006, these claims are not time-barred. But Robinson’s evidence that she was *granted* a transfer in July 2004 is not evidence of a discriminatory or adverse act, and she has failed to identify any *denial* of a promotion or a request to transfer that occurred after March 31, 2004. Her general allegation that she made several requests to transfer up until July 2004 is insufficient to show that at least one incident occurred within the limitations period. For this reason, the district court did not err in concluding that Robinson’s claims for denial of promotion or transfer are time-barred.

Robinson alleges that in December 2004, a white male corrections supervisor was allowed to assume Spencer’s duties (a work-out-of-class opportunity) while Spencer was on a leave of absence, even though she was better qualified to handle Spencer’s responsibilities. Robinson’s claim that she was denied the opportunity to work out of class in December 2004 is not time-barred and to the extent it was included in claims dismissed as time-barred, the district court erred. But the district court dismissed all claims that were not time-barred as not involving an adverse employment action that

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<sup>1</sup> “Work out of class” is a reference to an opportunity to work temporarily in a different or higher classification than the one to which an employee is assigned. Robinson argues that, because of her race, she was denied several opportunities to gain experience by working out of class.

would support a discrimination claim. As discussed below, dismissal of Robinson's claim relating to the December 2004 work-out-of-class opportunity on that ground was not error.

**b. Claims of Spencer, Robinson, and Grant not time-barred were properly dismissed for failure to establish actionable discrimination**

One requirement of a prima facie case of discrimination is that the employer's conduct amounts to an adverse employment action. *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). Adverse employment actions are those actions that "have had some materially adverse impact on [the employee's] employment." *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998) (holding that change in taking federal holidays, significant reduction in supervisory responsibility, and exclusion from management meetings was adverse employment action); *see also Ledergerber v. Stangler*, 122 F.3d 1142, 1144-45 (8th Cir. 1997) (stating that to be adverse, the action must have more than a tangential effect on an employee's employment).

Unpalatable transfers and low performance reviews are generally not actionable. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *see also Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) (stating that common sense excludes adverse actions having only minimal effects on employee's job). "Mere inconvenience or unhappiness on the part of the employee will not lead to a finding of actionable adverse employment action." *Ludwig v. Nw. Airlines, Inc.*, 98 F. Supp. 2d 1057, 1069 (D. Minn. 2000).

In this case, the district court concluded that all of appellants' remaining discrimination claims under the MHRA failed because appellants did not present sufficient evidence to create a question of fact about whether they suffered an adverse employment action.<sup>2</sup>

### 1. Spencer

Spencer argues that each of his non-time-barred claims sufficiently demonstrated an adverse employment action by the DOC. Spencer specifically cites a poor performance review given by his supervisor. But “[a] negative performance review is not in itself an adverse employment action, and it is actionable only if the employer subsequently uses that review to alter the terms or conditions of employment to the detriment of the employee.” *Burchett v. Target Corp.*, 340 F.3d 510, 519 (8th Cir. 2003). There is no evidence that following this review the DOC altered Spencer's terms or conditions of employment.

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<sup>2</sup> On a motion for summary judgment, “when the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc.*, 566 N.W.2d at 71 (footnote omitted); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that “[a] party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions”).

Spencer also claims that he was treated differently from white employees for violation of the DOC's key policy.<sup>3</sup> But the record of this incident establishes that the white employees were not similarly situated because they were not in supervisory positions and were not alleged to have failed in supervisory duties. Even if the oral reprimand Spencer received for this violation was an adverse employment action, Spencer has failed to show that he was reprimanded because of his race or that the reprimand occurred in "circumstances which allow the court to infer unlawful discrimination." See *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 945 (8th Cir. 1994) (quotation omitted).

Spencer also alleges that he suffered an adverse employment action when his supervisor "intentionally hindered his attempts to fill a [vacant chaplain position] and assisted a similarly situated Caucasian to fill a case manager position,"<sup>4</sup> making it difficult for him to schedule coverage of the area and making him "look bad" as a supervisor. Additionally, Spencer contends, without specificity, that he was not allowed to use flex time in the same manner as white employees, was yelled at more than his white colleagues, and that supervisors withheld information from him, all constituting

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<sup>3</sup> The key violation at issue was included in the second amended complaint and therefore was not part of the complaint considered by the district court. But the parties nonetheless brief the issue repeatedly. Spencer was investigated for providing an employee with an unauthorized key code and not filling out a request to provide that employee with her own key code. Spencer was found not to have authorized her use of the code, but to have violated policy and failed in his supervisory duties by not timely filling out the key request. Spencer was issued a letter of expectation and an oral reprimand for this violation.

<sup>4</sup> In the complaint, Spencer alleges that he was denied assistance filling this position, not that his attempts were "intentionally hindered."

adverse employment actions. But these claims demonstrate, at most, a contentious working environment and Spencer's dissatisfaction with his superiors' decision making. There is no evidence that as a result of any of these incidents Spencer suffered diminution in his title, responsibilities, salary, or benefits, so as to constitute an adverse employment action. The district court did not err in concluding that, as a matter of law, Spencer's claims are not actionable race-discrimination claims.

Spencer's allegation that he was constructively discharged in December 2005 is not contained in the complaint, but it was briefed and argued to the district court. The district court did not specifically address this claim in the summary-judgment order or attached memorandum, but to the extent Spencer can be found to have made this claim, it was dismissed by the order dismissing all of his MHRA claims for failure to state an actionable claim. Both parties have addressed this claim on appeal so we will address it in the interest of judicial economy.

Constructive discharge, for the purposes of the MHRA, occurs "when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination." *Navarre v. S. Wash. County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002) (quotation omitted). In order to establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to resign or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995). Because we agree with the district court that Spencer has failed to make a prima facie case of actionable discrimination, we also find

no merit in his constructive-discharge claim. *See Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000) (noting cases where loss of supervisory responsibility, suspension, a feeling of being unfairly criticized, dissatisfaction with work assignments, and loss of pay are insufficient to constitute constructive discharge).

## **2. Robinson**

Robinson argues that an unfair investigation, denied opportunities to work out of class, having her effectiveness as a supervisor undermined, interference with Spencer's evaluation of her work, unfair criticism, restricting her access to information, and forcing her to accept an unfair supervisory conference constitute discrimination on the basis of race in violation of the MHRA. Robinson has not presented any evidence of a change in the terms and conditions of her employment as a result of any of these incidents. She asserts that because she was not appointed as acting captain, she was denied the opportunity to gain experience and "actual or potential" income that lesser-qualified white employees received. There is no evidence in the record, however, to support her claim of actual loss of income, and we conclude that, as discussed above, the loss of the opportunity to gain experience from an out-of-class assignment does not rise to the level of an actionable adverse employment action. The district court did not err in dismissing Robinson's claims for failing to create a question of fact about actionable race discrimination.

## **3. Grant**

Grant argues that a supervisory conference he received for failure to document issuance of a syringe was discipline constituting an adverse employment action, despite

the DOC's assertion that supervisory conferences do not constitute discipline. Grant points to evidence in the record that Ekereuke's supervisor denied her a promotion in part because she received a supervisory conference to support his claim that a supervisory conference can result in negative employment decisions. But there is no evidence in the record that any negative consequences occurred to Grant as result of this supervisory conference or that it had any material impact on his job.

Grant further argues that he suffered an adverse employment action when he was not allowed to transfer from his position of Corrections Officer II (CO-II) at MCF-Lino Lakes to a position as CO-III at MCF-OPH. But Grant acknowledges that this was a lateral transfer; he was a CO-II at MCF-Lino Lakes and transferred to MCF-OPH as a CO-II, and within two weeks of his transfer, Grant was promoted to CO-III. Grant has not produced evidence sufficient to support a prima facie case that other similarly situated employees were given preferential treatment in this regard or that the manner of his transfer adversely affected his employment. Grant also claims that the DOC wrongfully extended his probationary period at MCF-OPH. But this extension was later rescinded retroactively so that Grant did not suffer any adverse consequences. The district court did not err in concluding that the actions Grant complains of did not constitute adverse employment actions and therefore did not rise to the level of actionable claims under the MHRA.

- c. Ekereuke established a prima facie case of race or national-origin discrimination for failure to promote**

Ekereuke claims that she was denied promotion on four occasions, that less-qualified white employees were hired into the positions that she was denied, and that a white coworker was paid more than she was paid for the same work. Ekereuke asserts that she loved her work at the DOC but that she was constructively discharged because she believed she would not be promoted or receive an increase in pay. Like Spencer's constructive-discharge claim, Ekereuke's claim of constructive discharge is not in the complaint, but the claim was briefed and argued to the district court and has been briefed by both parties on appeal.<sup>5</sup> We will consider it in the interest of judicial economy.

We conclude that because failure to promote and unequal pay are adverse employment actions, Ekereuke has made a prima facie case of discrimination on the basis of race and/or national origin, and the district court erred by dismissing these claims for failure to state a prima facie case. But frustration and embarrassment at not being promoted and dissatisfaction with work assignments have been held not to make work conditions sufficiently intolerable to constitute constructive discharge. *Tidwell v. Meyer's Bakeries, Inc.*, 93 F. 3d 490, 495-96 (8th Cir. 1996). And there is no evidence that the DOC acted intentionally to force Ekereuke to leave her job. We therefore conclude that the district court did not err in implicitly holding that she failed to make a prima facie case of constructive discharge.

**d. Appellants failed to establish a prima facie case of actionable hostile work environment**

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<sup>5</sup> The constructive-discharge claims were contained in the appellants' proposed second-amended complaint rejected by the district court when it granted summary judgment to the DOC.

In the complaint, each appellant makes an identical allegation that throughout his or her employment with the DOC, he or she was forced to work in an intimidating, hostile, and offensive working environment. Each appellant illustrated this claim by listing specific incidents unique to each. The district court treated some of the listed incidents as allegations of discrete acts of discrimination as discussed above, and dismissed the hostile-work-environment claims as part of the “remaining claims” for which appellants failed to provide sufficient evidence to raise a fact question about the existence of a prima facie case, or for which the DOC presented rebuttal evidence that appellants failed to show was questionably a pretext for discrimination.

The Supreme Court has stated that:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The “unlawful employment practice” therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.

*Nat’l R.R. Passenger Corp.*, 536 U.S. at 115, 122 S. Ct. at 2073 (citations omitted).

Allegations of discriminatory harassment are not actionable unless so severe or pervasive as to “alter the conditions of [the plaintiff’s] employment and create an abusive working environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

The objectionable environment “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did

perceive to be so.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 2283 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370 (1993)).

To establish a prima facie case of hostile work environment, a plaintiff must show: (1) he/she is a member of a protected class; (2) he/she was subjected to unwelcome harassment; (3) the conduct was based on his/her protected class membership; (4) the conduct affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001); see *Gagliardi v. Ortho-Midwest*, 733 N.W.2d 171, 176-77 (Minn. App. 2007) (applying *Goins* test without addressing an amendment to the MHRA that removed the requirement of employer’s knowledge from the definition of sexual harassment). In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, 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.” *Faragher*, 524 U.S. at 787-88, 118 S. Ct. at 2283 (quotation omitted). Simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to a hostile-work-environment claim under the MHRA. *Mems*, 327 F.3d at 782.

Appellants argue that the instances cited in their complaint, deposition transcripts, and affidavits support a finding of a workplace “so permeated with intimidation, discrimination, and ridicule as to make it unbearable for [appellants] to work.”

Appellants generally state that “[t]he incidents listed in . . . the Complaint and described in [their] affidavits point out the harassment that [each of them] suffered at the hands of Respondent and establish that Appellants proved their prima facie case.” But appellants do not independently address each of the factors necessary to make a prima facie showing of hostile work environment, and although appellants acknowledge that the DOC took remedial actions, appellants summarily dismiss the actions as “insufficient.”

Appellants assert that the following incidents, in addition to actions already discussed above, are the type of actions that made the work environment hostile.

**1. Spencer**

(1) The DOC was insufficiently concerned for his safety when he worked at the chapel but provided safeguards for a white female employee when she worked at the chapel and (2) he was expected to tour all of the living units daily but while he was on medical leave, his replacement was only required to tour each unit weekly.

**2. Robinson**

A coworker told her that she was promoted only because of affirmative action.

**3. Ekereuke**

Her supervisor knew that another employee made offensive comments to her about her national origin but took no action.

**4. Grant**

(1) His coworkers complained about the circumstances of his transfer to MCF-OPH and about affirmative action; (2) a coworker made an insensitive remark that prisoners thought her husband was black because he has big lips and a big nose; and (3)

his supervisors failed to put him on leave while they investigated two anonymous telephone calls warning that other officers would not back him up in a crisis.

Appellants themselves provided evidence that the DOC took some remedial action for each reported incident. For example, Ekereuke testified in her deposition that after she complained to her supervisor, he talked to the person who had made inappropriate remarks to her and that person was required to personally apologize to her. She did not allege that this person ever again made inappropriate remarks to her. Robinson testified in her deposition that when she complained to a supervisor that a coworker had told her that she was promoted only because of affirmative action, the supervisor called a meeting of all the lieutenants, including Robinson, and said that no one was going to leave the room until all of their differences had been worked out. The supervisor invited everyone to put any complaints about Robinson “on the table.” No one came forward with any complaints, and the meeting was adjourned. Robinson also testified that there has always been “racially charged” language used at MCF–Lino Lakes, stating:

It’s the culture of [MCF – Lino Lakes]. I just can’t remember all of the specific times and dates and details and who. Because of that climate that exists there, we’ve had interventions, training, policies written, and memos from the commissioner on zero tolerance, and hostile-free work environment, discrimination-free, different attempts.

Grant does not dispute that the DOC investigated the anonymous calls implying that he would not receive back-up from coworkers, and he does not allege that there was ever a time when he was deprived of needed assistance of a coworker.

Appellants rely on isolated incidents dating back to 1992, only a handful of which are alleged to be directly related to their protected status. We do not minimize the distress that even one racial slight can inflict, but, under existing caselaw, we conclude that the district court's dismissal of appellants' allegations of hostile work environment for failing, as a matter of law, to rise to the level of actionable discrimination is supported by this record.

**e. Ekereuke presented evidence that raises a question of fact regarding the pretextual nature of the DOC's rebuttal of her prima facie case**

Under the *McDonnell Douglas* framework, after Ekereuke established a prima facie case of discrimination, the DOC had the burden to provide legitimate, non-discriminatory reasons for its decisions. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. To avoid summary judgment, Ekereuke then had the burden to show that a fact question exists about whether the DOC's proffered reason was a pretext for unlawful discrimination. *Id.* at 804, 93 S. Ct. at 1825. At trial, an employee may sustain the burden of showing pretext "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Sigurdson*, 386 N.W.2d at 720.

Ekereuke's supervisor stated in an affidavit that Ekereuke was not promoted, in part, because of a supervisory conference. But the DOC's evidence raises a question of fact about whether a supervisory conference is a legitimate reason for an adverse employment action. No record of such conference is kept in an employee's file.

Ekereuke's supervisor also stated that he did not recommend her for a promotion because he "determined that her written work such as case notes, program participation summaries, and discharge summaries needed improvement, as did her deportment with the inmates." But the record is devoid of standards for written work or deportment against which Ekereuke was measured, and there is no evidence that she was ever criticized for her performance in either area.

Ekereuke's affidavit asserts that after she questioned her supervisor about how she could achieve a promotion, her supervisor agreed to meet with her for five sessions over five weeks, after which he would complete the necessary paperwork for her promotion. He did meet with her, but never completed the paperwork for her promotion and failed to respond to her inquiries about why he had not done so.

We conclude that Ekereuke has created a fact question about the pretextual nature of the DOC's reasons sufficient to preclude summary judgment. We reverse the summary judgment dismissing Ekereuke's claims for failure to promote and remand to the district court for further proceedings.

## **II. Retaliation and Reprisal claims**

Appellants assert on appeal that the district court erred in concluding that they failed to establish a prima facie case of retaliation and reprisal. The MHRA forbids reprisal against any employee who opposes a practice forbidden under the Act, or has filed a charge with the MDHR. Minn. Stat. § 363A.15 (2004).

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an

individual because that individual has engaged in [any] of the activities listed [above]: refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . . .

*Id.*

A prima facie case of reprisal consists of a showing that: (1) complainant engaged in statutorily protected conduct; (2) adverse employment action was taken by the employer; and (3) a causal connection exists between the two. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 548 (Minn. 2001).

A causal connection between protected activity and adverse employment action taken by the employer “may be demonstrated indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time.” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 445 (Minn. 1983). “Proof of a causal connection must be something more than merely consistent with the plaintiff’s theory of the case.” *Bernloehr v. Cent. Livestock Order Buying Co.*, 296 Minn. 222, 224, 208 N.W.2d 753, 754 (1973). Where timing is suggested as proof of causation, the time between an employee’s complaint and the employer’s action must be “very close.” *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511 (2001).

In their first amended complaint, appellants all alleged that they suffered retaliation after filing this lawsuit. And in their brief on appeal, appellants all assert that

they engaged in protected conduct; Spencer and Robinson by filing internal complaints against their supervisor, and Ekereuke and Grant by reporting alleged harassment to their supervisors. But overall, appellants inconsistently allege that the same conduct that precipitated this lawsuit was retaliation for them filing this lawsuit. They never clarify or distinguish between allegations of discrimination and allegations of retaliation. And the district court addressed only Spencer and Robinson's alleged claims for retaliation and reprisal in the complaint, because only they filed formal internal complaints while employed at the DOC. We decline to further address Ekereuke's and Grant's claims because they are too vague.

It remains unclear whether Spencer and Robinson now allege that their protected activity was the filing of this lawsuit or the filing of individual internal complaints and reports after they brought the lawsuit. It is undisputed that neither made a formal complaint of discrimination prior to filing the lawsuit. The district court dismissed Spencer's and Robinson's claims of retaliation and reprisal noting that "Spencer and Robinson have failed to demonstrate the existence of genuine issues of material fact as to their claims for retaliation and reprisal."

Spencer alleges that the investigation and reprimand for the key-access-code-policy violation was a retaliatory action for filing an internal complaint against his supervisor in September 2005. The investigation took place in November 2005, and Spencer received an oral reprimand in December 2005. The timing of the investigation and reprimand is not so close to the filing of the complaint that it gives rise to an

inference of a causal connection, even if being disciplined for an admitted violation of policy could be considered retaliation.

Robinson filed an in-house complaint against Spencer's supervisor in August 2005 and appears to assert that she also experienced a retaliatory investigation and was issued a retaliatory supervisory conference as a result of this complaint. But both "retaliatory" actions occurred before she filed the in-house complaint and were the subject of her in-house complaint. As with Spencer, there is no evidence or inference of a causal connection between this investigation and the filing of the lawsuit. We conclude that the district court did not err in holding that, as a matter of law, Spencer and Robinson failed to establish a prima facie case of retaliation or reprisal.

**Affirmed in part, reversed in part, and remanded.**