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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0647**

Roberta Castellano,  
Appellant,

vs.

Hennepin County,  
Respondent.

**Filed January 7, 2013  
Affirmed  
Halbrooks, Judge**

Hennepin County District Court  
File No. 27-CV-10-26542

Scott A. Johnson, Todd M. Johnson, Johnson Law Group LLP, Minnetonka, Minnesota  
(for appellant)

Michael O. Freeman, Hennepin County Attorney, Martin D. Munic, Senior Assistant  
County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and  
Collins, Judge.\*

**UNPUBLISHED OPINION**

**HALBROOKS**, Judge

Appellant challenges the summary-judgment dismissal of her whistleblower claim,  
arguing that the district court erred by determining that she failed to present evidence

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

sufficient to prove a causal connection between her reports of financial improprieties and respondent's decision to terminate her employment. We affirm.

## **FACTS**

Appellant Roberta Castellano worked for respondent Hennepin County in its library system from 1980 until the county terminated her employment in March 2009. At the time of her discharge, Castellano was employed as an Office Specialist III, and her job duties included processing direct deposits, reimbursement requests, and invoices. Beginning in 1997 and through the end of her employment, she reported to senior accountant Donald Kleven.

In annual performance reviews completed in 2000, 2005, and 2006, Kleven rated Castellano's overall performance as meeting expectations, but he also noted deficiencies in her job performance, in particular her failure to timely complete work. In January 2006, Kleven completed a special review, rating Castellano's overall performance as unacceptable, taking particular note of disrespectful e-mail communications from Castellano to Kleven and other county employees. The review directed Castellano to complete her work in a more timely fashion and to review and follow the county's Dignity and Respect Policy. In Castellano's next annual review, completed in September 2006, Kleven acknowledged that Castellano had made improvements in the areas identified in the special review, expressing appreciation for "the commitment, effort and diligence you have demonstrated these past few months in the performance of your job." In October 2007, Kleven commented that Castellano's work was timely and accurate, that

she continued to be a good resource for other staff, and that she had maintained positive working relationships with staff and vendors.

Castellano refused to sign her 2000 annual review, and she submitted five-page letter responses to the annual reviews for 2005 and 2006 and to the January 2006 special review. In those responses, Castellano asserted that she was unable to timely complete work because of an excessive workload; that Kleven failed to credit her for her accomplishments and claimed her work as his own; that Kleven and others treated her in an abusive and discriminatory manner; and that she was subject to retaliation because she refused to participate in allegedly noncompliant financial practices. She asserted that the more favorable 2006 annual review was deceptive, demeaning, and false, and particularly that the laudatory statements about her recent job performance “insinuate[d] that [her] previous performance lacked commitment, effort, and diligence.” Again in 2007, notwithstanding the positive nature of her review, Castellano submitted a five-page response, in which she reasserted many of her past complaints about Kleven.

Both Kleven’s supervisors and human-resources employees became involved in attempting to resolve the issues between Castellano and Kleven. Castellano met with Kleven and his supervisor David Cramer in March 2006 as a follow up to the special review. During that meeting, they discussed expectations regarding Castellano’s completion of her job duties, and Cramer and Kleven followed up with a memo summarizing the expectations. In October 2006, Castellano included human-resources employee Ann Daly in an e-mail that she sent to Kleven in response to his draft of the 2006 annual review. In that e-mail, Castellano made many of the same assertions that

she had made in response to previous performance reviews. She asserted that she had performed her job in an outstanding manner “in spite of [Kleven’s] abusive and irresponsible behaviors”; urged Kleven to “apologize for your many past abusive behaviors” including his “deceptive and covert manipulation of [her] job duties”; and chastised that she “should not have been placed in the position of having to ask for this remedy. You should do this on your own.” Following this e-mail, Castellano and her union representative met with Kleven and human-resources manager Teresa Jepma. Jepma told Castellano that the tone and language of her e-mail to Kleven was inappropriate and violated the dignity-and-respect policy.

In November 2006, Castellano sent a 68-page letter to Daly, in which she recounted her employment history and reiterated many of the issues raised in her responses to her performance evaluations. Castellano also asserted in this letter a variety of concerns about the manner in which payables were being handled by the library system. She urged that an audit of the library was warranted, and she sent a copy of the letter to the county’s internal-audit department. After receiving the letter, Daly conducted an investigation of Castellano’s allegations regarding harassment and abusive working conditions, and found that issues raised did not constitute a hostile work environment, although she did note some areas of concern to be addressed with Castellano’s supervisors. The audit department conducted an audit of the library system. Castellano participated in interviews and provided information for the audit. The audit, which was completed in January 2008, found some inappropriate practices, but no evidence of fraud, theft, or intentional misconduct.

Although Castellano received positive performance evaluations in 2006 and 2007, Kleven and other managers continued to have concerns about Castellano's inappropriate and disrespectful e-mail communications. In December 2007, Kleven, Cramer, and Nancy Palmer, the division manager of library operations, met with Castellano to discuss the nature and tone of Castellano's communications with Kleven and Cramer. Palmer directed Castellano, Kleven and Cramer to meet with the facilitator to work on improving their working relationships, but the facilitator ultimately called off the sessions after Castellano refused to participate in any meaningful way.

Castellano's performance and behavioral issues continued into 2008. In March, she received an oral reprimand addressing the improper tone of her e-mail communications, her refusal to participate in meetings with the facilitator, and other insubordinate conduct. Also in March 2008, Palmer requested a forensic examination of Castellano's computer after being notified that Castellano had sent an e-mail to the audit department with another employee's performance evaluation attached. Palmer met with human-resources employees and a county forensic investigator in March 2008 to discuss options and decided to go forward with the examination. The investigator concluded that Castellano's e-mail did not violate any laws. In June 2008, Castellano received a written reprimand for her continued disrespectful e-mail communications and refusal to participate in facilitated discussions. In October 2008, Kleven completed a performance evaluation giving Castellano an overall rating of "Needs Improvement" and noting that "[a]lthough her technical skills and direct work responsibilities have been satisfactory there have been some behavioral issues that have been unacceptable."

In late 2008 and into 2009, Castellano again experienced difficulties keeping up with her work. She and a coworker had been given additional duties because of budgeting issues that caused the county to eliminate or not fill open positions, but her workload was offset in other ways. In January 2009, Kleven and Pam Dymoke, who replaced Cramer as finance manager, met with Castellano to discuss their concerns about how long it was taking Castellano to complete her work. Dymoke followed up with an e-mail reminding Castellano of the deadlines for completing certain tasks and requesting updates from Castellano. Dymoke also requested a second forensic examination of Castellano's computer use in early 2009 because of concerns about Castellano's productivity and work hours. The investigator found no evidence of inappropriate content or activity that violated county policy.

In March 2009, the county took steps to terminate Castellano's employment. On March 10, 2009, Dymoke, Jepma, and Kleven met with Castellano and her union representative to discuss her continuing failure to timely complete her work. At the conclusion of this meeting, they placed Castellano on administrative leave. On March 16, 2009, Dymoke gave Castellano notice of the county's intent to terminate her employment, explaining that "[t]his was the only viable course of action following many attempts to remediate your conduct that has continued for more than a year" and that Castellano's "performance [had] deteriorated to a level that [was] unacceptable for a period of several months." Castellano appealed her dismissal to the library director, who upheld the decision. Castellano filed an administrative appeal, but later withdrew it.

Castellano then initiated this action under the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2012), alleging that the county terminated her employment in retaliation for her reports to the human-resources and audit departments of financial improprieties within the library system. The district court granted the county's motion for summary judgment, determining that Castellano failed to present evidence sufficient to show a causal connection between her communications with the human-resources and audit departments and the county's decision to terminate her employment. This appeal follows.

## D E C I S I O N

We review a grant of summary judgment de novo. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 18 (Minn. 2009). In doing so, we determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 623 (Minn. App. 2007). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Kratzer*, 771 N.W.2d at 18. No genuine issue of material fact exists when the nonmoving party presents evidence that only creates a “metaphysical doubt” as to a factual issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The party resisting summary judgment must do more than rest on mere averments. *Id.* No genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could not find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008).

The Minnesota Whistleblower Act (MWA) prohibits an employer from taking adverse action against an employee because she “in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.” Minn. Stat. § 181.932, subd. 1(1) (2012).<sup>1</sup> We analyze whistleblower claims under the *McDonnell Douglas* burden-shifting framework. See *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001) (applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)), *review denied* (Minn. May 15, 2001). The first step of the *McDonnell Douglas* framework requires an employee to establish a prima facie case of retaliation by showing that (1) she engaged in statutorily protected conduct; (2) she suffered an adverse-employment action by the employer; and (3) a causal connection exists between the two. *Id.*

The district court determined that Castellano “provided sufficient evidence that she reported a violation, or suspected violation, of statutes and rules to the Human Resources and Internal [Audit] departments of the Hennepin County Library” and that she “suffered an adverse employment action when she was terminated from her job in March, 2009.” But the district court concluded that Castellano failed to establish a prima facie case of retaliation because “[t]here is little to no direct evidence to show that the

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<sup>1</sup> Castellano also alleged in her complaint a violation of subdivision 1(3), which protects an employee who refuses to perform an action that she has an objective basis to believe violates a law. Minn. Stat. § 181.932, subd. 1(3) (2012). But she limits her appeal to the circumstances surrounding her report to the internal-audit department in November 2006 and participation in the audit.

termination in March, 2009, resulted from a report made in November, 2006, and there are substantial facts to show she was terminated for other reasons.”

A causal connection exists where there is a relationship between the protected conduct and adverse-employment action, such that one event is generated by the other. *Freeman v. Ace Tel. Ass’n*, 404 F. Supp. 2d 1127, 1142 (D. Minn. 2005) (analyzing MWA claim). Causation requires a showing of retaliatory motive. *Harnan v. Univ. of St. Thomas*, 776 F. Supp. 2d 938, 948 (D. Minn. 2011) (analyzing MWA claim). Because retaliatory motive is often difficult to prove by direct evidence, an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive. *Cokley*, 623 N.W.2d at 632.

Timing is relevant when analyzing whether a causal connection exists. While the passage of time does not necessarily foreclose a claim of retaliation, a gap in time between protected conduct and the adverse-employment action weakens an inference of retaliatory motive. *Miller v. Stifel, Nicolaus & Co.*, 812 F. Supp. 2d 975, 991 (D. Minn. 2011) (analyzing MWA claim and concluding that eight-month span between last complaint and termination supported grant of summary judgment to employer on causation); *see also Kasper v. Federated Mut. Ins., Co.*, 425 F.3d 496, 503 (8th Cir. 2005) (analyzing Title VII and Minnesota Human Rights Act retaliation claims where plaintiff was terminated nearly one year after engaging in protected conduct supported grant of summary judgment to employer). “An employee may attempt to shorten the gap between her protected activity and the adverse action by showing that shortly after she engaged in the protected activity, the employer took escalating adverse and retaliatory

action against her.” *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 866 (8th Cir. 2006) (quotation omitted) (analyzing Family Medical Leave Act retaliation claim). “A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the causation requirement.” *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002) (analyzing Family Medical Leave Act retaliation claim).

In this case, the significant length of time between Castellano’s alleged reports and the termination of her employment belies her assertion of a causal relationship between the two. Castellano submitted her 68-page letter to the human-resources department in November 2006, last contacted the audit department in January 2008, and was terminated in March 2009. Thus, Castellano was terminated more than two years after her initial report and 14 months after her last contact with the audit department.<sup>2</sup> We agree with the district court that this passage of time “tends to show the lack of a causal connection.”

Castellano argues that she has provided evidence from which a conclusion could be drawn that management engaged in a targeted and escalating course of retaliatory action that ultimately led to her termination. She asserts that the forensic investigations, reprimands, 2008 performance review, and increases to her workload in late 2008 and

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<sup>2</sup> The MWA protects employees who “report[] a violation or suspected violation” of law. Minn. Stat. § 181.932, subd. 1(1). We have defined “report” in the context of the MWA as “[t]o make or present an often official, formal, or regular account of” or “[t]o relate or tell about; present.” *Janklow v. Minn. Bd. of Exam’rs for Nursing Home Adm’rs*, 536 N.W.2d 20, 23 (Minn. App. 1995), *aff’d on other grounds*, 552 N.W.2d 711 (Minn. 1996). Castellano presented an account of alleged violations when she submitted her 68-page letter to the internal-audit department and participated in the audit throughout 2007. Her last e-mail to the internal-audit department was sent January 14, 2008. Based on our definition of report and our standard of review to view the evidence in light most favorable to Castellano, Castellano arguably last engaged in protected conduct on January 14, 2008.

early 2009 “connect the dots” between her report and termination in order to create an inference of retaliation. After reviewing all of the evidence, the district court concluded that “Castellano’s belief that management initiated a campaign against her to ultimately result in her termination is mere speculation that does not create a genuine issue of material fact for trial” and, instead, “the facts show a continuing pattern of non-cooperation on the part of Castellano, and a continued effort by management to resolve certain issues.” Our careful review of the record likewise persuades us that Castellano has not raised genuine issues of material fact and that, even considering the evidence in its entirety, no reasonable factfinder could find in Castellano’s favor on her whistleblower claim. Although we consider the evidence in its entirety, we separately address below each of the events that Castellano claims is part of the series of retaliation.

**A. The forensic examinations**

In attempting to establish a course of retaliatory conduct, Castellano relies heavily on the circumstances surrounding the forensic examinations of her computer. She asserts that an inference of retaliation is supported by the timing of the first examination in relation to the release of the audit of the library system as well as comments made by Palmer at the March 2008 meeting with human-resources investigators and the county investigator and inconsistencies in the record regarding the purpose of that meeting. But we conclude that Palmer’s comments are not sufficiently probative of retaliatory intent and that any inconsistencies in the testimony do not raise genuine issues of material fact. Thus, we agree with the district court that “[t]he forensic reviews were conducted when management had evidence to form a reasonable belief that Castellano had potentially

used her computer in violation of policy, by obtaining e-mails of others and working past her designated hours, possibly creating liability on the part of the county.”

The investigator’s notes from that meeting reflect that Palmer referred to Castellano as a “whistleblower” in relation to the 68-page letter that she sent to the audit department and that Palmer would assign additional work to Castellano. But Castellano does no more than speculate that these comments are evidence of a retaliatory scheme, rather than factual references to what Castellano herself characterizes as a whistleblowing report to the audit committee and the adequacy of Castellano’s workload. Moreover, although Palmer’s and the investigator’s testimony differed as to the initial reason for calling the meeting, both agreed that the purpose of the meeting was to determine whether the forensic team should be involved. And the results of the investigation were limited to the e-mail in question and Castellano’s general e-mail activity, rather than a search for something “wrong” to report to Palmer.

Castellano also asserts that, at this meeting, Palmer lied about Castellano working beyond her scheduled hours. But Palmer testified that she had heard from other employees, including the library director, that Castellano was staying at the office past 5:00 p.m. Palmer was concerned that Castellano’s late hours might implicate wage-and-hour-law violations. Castellano provides no evidence that this was false. Instead, she excuses her conduct by claiming that no office policy existed. But in October 2007, management requested staff, including Castellano, to standardize their working hours. Castellano e-mailed Palmer, Kleven, and Kleven’s supervisor, indicating that she

understood the new hours were 8:00 a.m. to 5:00 p.m., unless employees made other arrangements.

Castellano finally argues that she was unfairly subjected to a second forensic review shortly before she was terminated. The second forensic review of Castellano's computer use was conducted in early 2009 after Dymoke identified a drop in Castellano's work productivity. Castellano conceded that she failed to process her direct deposits for January and February 2009 on time, and cites no evidence to suggest that the 2009 review was undertaken with a retaliatory purpose.

#### **B. The reprimands**

The oral reprimand that Castellano received in March 2008 and the written reprimand she received in June 2008 both cited her continuing disrespectful communications, her refusal to participate in facilitated discussions to improve her working relationships with her supervisors, and her failure to adhere to her set hours. Castellano argues that the circumstances surrounding the reprimands create a genuine issue regarding causation because of the timing of the reprimands and because there was no basis for the criticisms in the reprimands. We agree with the district court that the "reprimands resulted from her failure to respond to repeated notices that the tenor of her emails was in violation of policy, as well as her failure to cooperate with attempts to resolve some of her personnel issues."

With respect to timing, "[e]vidence of an employer's concerns about an employee's performance before the employee's protected activity undercuts a finding of causation." *Kasper*, 425 F.3d at 504. A complainant may not "clothe [herself] with

immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with [her] peers.” *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988) (analyzing Title VII retaliation claim). Both the oral and written reprimands addressed Castellano’s communications which had been earlier criticized in her 2005 performance review, 2006 special review, and during a 2006 meeting. The reprimands addressed the same problematic behavior that Castellano had exhibited prior to her report, thus negating an inference of retaliation.

At oral argument, Castellano cited as error the district court’s finding that Castellano failed to participate in the facilitated meetings. But Castellano makes no showing that she actually participated at the meetings. Instead, the evidence indicates the opposite. The facilitator noted that Castellano took copious notes to the point of not tracking with the conversation. Castellano told the facilitator that she would not participate until her record was corrected and the past was resolved. When asked how that could be accomplished, she did not offer a solution. The facilitator asserts that he repeatedly, but without success, attempted to engage Castellano and offered her alternative ways to address her issues.

Castellano also argues that she was wrongly reprimanded for staying in the office past structured work hours. Again, the evidence presented belies this assertion. Palmer had heard from other employees that Castellano was staying at the office past 5:00 p.m. and Castellano knew that regular office hours ranged from 8:00 a.m. to 5:00 p.m.

### **C. Castellano's 2008 annual performance review**

Castellano's 2008 annual performance review again cited Castellano's disrespectful communications. As with the reprimands, Castellano argues that the statements about her performance in the review are without basis. But the evidence belies her assertions. Castellano argues that the review characterized her work as substandard, but she received a "meets expectations" rating for job knowledge and skills and personal job responsibility—the same rating for those categories that she had received in previous performance reviews. She also criticizes the review for referencing the reprimands, which she asserts were unwarranted, but, as we discuss above, the evidence in the record provides a basis for the reprimands. And she argues that a comment in the review that she stepped outside of the scope of her responsibilities "no doubt refer[ed] to the whistleblower reports made to the internal audit division," but offers no more than speculation to support this assertion.

### **D. Workload**

In late 2008 and early 2009, Castellano's workload increased in certain respects. Castellano asserts that the circumstances surrounding this workload increase support an inference of retaliation. Again, here, we conclude that the evidence cited by Castellano fails to create a genuine issue of material fact that her workload was increased in retaliation for her report to the audit department.

While Castellano asserts that her workload "nearly tripled" in late 2008 and early 2009 and that the workload increase was motivated by retaliation, the evidence does not support her claim. Dymoke testified that the two-week backlog of work resulted from the

elimination of two positions. The work from those positions was divided between Castellano and her coworker. Castellano was given more direct-deposit responsibilities than her coworker, but Castellano's invoice work was reduced in order to give her more time to handle the increase in direct deposits. Castellano agrees that the number of invoices she processed decreased, but disputes the amount. She has not produced a more accurate figure. Castellano argues an inference of retaliatory motive is supported by Palmer's comment at the 2008 meeting that she would give Castellano more work, but offers no more than speculation to connect this vague comment—made nearly seven months earlier by a different supervisor—to the increase in her workload that indisputedly followed position eliminations and also affected another of Castellano's coworkers.

Castellano finally asserts that she was almost caught up with her work in 2009 and that Dymoke misrepresented her level of productivity to Palmer. Dymoke submitted a graph labeled "Direct Deposit Processed on Time" to Palmer in connection with the decision of whether or not to terminate Castellano. The graph indicates that the timeliness of Castellano's direct-deposit work decreased in December 2008 to below 60%, and further declined to 0% for January and February 2009. Castellano does not dispute that she failed to complete direct deposits on time for those two months, and she failed to produce any evidence, beyond her mere assertion, that she was "nearly caught up" with her work in March 2009.

No reasonable jury, after reviewing all of the evidence, could find a causal connection between Castellano's protected conduct and termination, even when

considering the forensic reviews, reprimands, 2008 performance review, and her workload. Because there are no genuine issues of material fact and reasonable persons would not draw different conclusions from the evidence presented, the district court did not err in its legal analysis. Summary judgment therefore was properly granted to the county.

**Affirmed.**