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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1185**

Virginia Ludwig,  
Appellant,

vs.

The Church of the Epiphany of Coon Rapids, Minnesota,  
Respondent.

**Filed February 4, 2013  
Affirmed  
Hudson, Judge**

Ramsey County District Court  
File No. 62-CV-11-3866

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(for appellant)

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Considered and decided by Hudson, Presiding Judge; Chutich, Judge; and  
Klaphake, Judge.\*

**UNPUBLISHED OPINION**

**HUDSON**, Judge

Appellant, who was discharged from her teaching job as part of a reduction in  
force, challenges the summary-judgment dismissal of her age-discrimination and breach-

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

of-employment-contract claims. Because the district court did not err by concluding that appellant's proffered direct and circumstantial evidence failed to raise a genuine issue of material fact as to either of these claims, we affirm.

## **FACTS**

Respondent The Church of the Epiphany of Coon Rapids, Minnesota, discharged appellant Virginia Ludwig from her employment as a junior-high language-arts teacher as part of a reduction in force (RIF) in May 2009. Ludwig was 62 years old and had a master's degree. She had worked for the parish for nearly 20 years, and she was one of Epiphany's highest-paid employees. Her employment was subject to an agreement called Justice in Employment (JIE). JIE provides that employees may be discharged only for cause, but an RIF is considered discharge for cause if the employer uses "valid criteria such as past performance, seniority, education, training and work skills needed by the organization."

As of 2009, enrollment at Epiphany School had been declining, and continued decline was projected, with rising school expenses contributing to a difficult parish financial situation. Epiphany instituted an RIF, informing school staff that reductions would be "primarily determined by enrollment and student sizes in each grade level." Epiphany first offered a voluntary separation program (VSP) to full-time employees whose combined age and years of service in the Archdiocese of St. Paul and Minneapolis was equal to or greater than 75. Of about 25 eligible employees, only six parish employees, and only one teacher, chose to participate in the VSP. Appellant was eligible for the VSP but declined to participate. Epiphany then involuntarily discharged three

teachers, though one was rehired when enrollment grew. Ludwig was the only teacher over 60 to be discharged; the other permanently discharged teacher was 28.

Ludwig had been nominated for a teaching award, and she had earned excellent performance reviews until 2008. In that year, after changes to the school's evaluation methods (the teaching rubric), she received a more negative review, with recommendations to use additional strategies besides whole-group instruction; to differentiate instruction for "at risk" students; and to work on proactive responses to student behavior. In 2009, her review rated her as needing improvement in several areas, with a notation that she "consistently demonstrates rigid, negative responses to feedback or change." In a letter to her file, which Ludwig asserts was inserted after her discharge, principal Jane Carroll indicated that visitors to Ludwig's classroom observed that instruction was primarily conducted in large groups; that students did not appear to be engaged; and that Ludwig had once called the school office requesting that an administrator correct her entire class for behavior issues.

Because of declining enrollment, there were fewer sections at the junior-high level, and Epiphany needed to eliminate a junior-high language-arts teacher and selected Ludwig. Ludwig learned of her discharge at a meeting with Carroll and parish administrator Michael Lentz. Ludwig asked to be reassigned to teach sixth-grade language arts. Epiphany denied her request. Epiphany sent Ludwig a letter explaining its reasons for discharging her: the need to eliminate teaching positions to reduce personnel costs; her licensure in grades 7–12 language arts; her past performance; and her status as the least senior of the junior-high language-arts teachers. The other junior-high

language-arts teacher, who was 63 and had been teaching at Epiphany five years longer than Ludwig, retained her position. Epiphany did not hire anyone to replace Ludwig, and current teachers assumed her duties. But several other teachers, unlike Ludwig, were offered the opportunity to move to different grade levels.

Ludwig filed a complaint in district court, alleging age discrimination under the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.01-.41 (2012), breach of contract, negligent and intentional infliction of emotional distress, breach of the covenant of good faith and fair dealing, and promissory estoppel. After the close of discovery, she moved for summary judgment on the breach-of-contract claim and to take an additional deposition; Epiphany sought summary judgment on all of Ludwig's claims.

The district court granted Epiphany's motion for summary judgment in all respects. The district court concluded that no genuine issue of material fact existed on the breach-of-contract claim because Epiphany had followed the required terms of the JIE by making a layoff decision based on "valid criteria." The district court also determined that no genuine issues of material fact existed as to whether Ludwig suffered age discrimination under a disparate-treatment theory, based on a direct method of proof. It rejected Ludwig's proffered evidence of an alleged statement, "Out with the old," made by Lentz when he handed out information relating to the VSP, concluding that this evidence was hearsay and that, even if admissible, it amounted to only a stray remark not sufficiently probative of discriminatory intent. The district court concluded that Ludwig's expert statistical evidence was not probative because of its small sample size and thus rejected her disparate-impact claim. The district court assumed, without

deciding, that Ludwig had met her burden to make out a prima facie case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25 (1973), but concluded that her proffered evidence was insufficient to create a genuine issue of material fact as to whether Epiphany’s stated reasons for discharging her were pretextual. On appeal, Ludwig challenges the district court’s summary judgment on her claims of age discrimination and breach of the JIE.

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

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *Star Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). No genuine issue of material fact exists “where 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). Only disputes over facts that might affect the outcome of the lawsuit under governing substantive law properly preclude the entry of summary judgment. *Id.* at 71. We review the evidence in the light most favorable to the party against whom judgment was entered. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

## I

The MHRA provides that an employer may not, because of age, “discharge an employee,” “refuse to hire” 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 (2012). In construing the MHRA, we apply Minnesota caselaw and “law developed in federal cases arising under Title VII of the 1964 Civil Rights Act.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). A plaintiff may seek to establish age discrimination based either on disparate treatment or disparate impact. *See Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37–38 (Minn. App. 2009) (describing disparate-treatment analysis); *Kohn v. City of Minneapolis Fire Dep’t*, 583 N.W.2d 7, 12 (Minn. App. 1988) (describing disparate-impact analysis), *review denied* (Minn. Oct. 20, 1988). A plaintiff who wishes to establish age discrimination based on disparate treatment may prove a claim under one of two methods: either directly or under the burden-shifting method outlined in *McDonnell Douglas*, 411 U.S. at 802–04, 93 S. Ct. at 1824–25. *Friend*, 771 N.W.2d at 37–38.

The direct method of proving employment discrimination requires a plaintiff to prove, using either direct or circumstantial evidence, that discrimination motivated an employment decision. *Id.* at 33, 37, 40. Direct-method cases “are adjudicated based on the strength of affirmative evidence of discriminatory motive.” *Id.* at 38 (citing *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)); *see also Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1118 (7th Cir. 2009) (stating that “[u]nder the direct method, the inference that the employer acted based on the prohibited animus has to be

substantially strong”). “Proof of discriminatory motive is critical.” *Goins v. West Grp.*, 635 N.W.2d 717, 722 (Minn. 2001).

Under the *McDonnell Douglas* framework, a plaintiff establishes a prima facie case by introducing evidence that he or she is a member of a protected class, was qualified for the position from which he or she was discharged, and was replaced by a non-member of the protected class. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). When a plaintiff is discharged as part of an RIF, and his or her job is eliminated or redistributed to other workers, the plaintiff who cannot demonstrate replacement by a non-member of the protected class instead must also provide “an additional showing” that membership in a protected class was a factor in the discharge. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995). If the plaintiff sustains the burden to make out a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the discharge; if that burden is met, the plaintiff then must prove, by a preponderance of the evidence, that those reasons were a pretext for discrimination. *Id.* at 323.

A court also reviews a disparate-impact case under the *McDonnell Douglas* framework. *Kohn*, 583 N.W.2d at 12. The plaintiff must first establish a prima facie case by producing evidence that challenged employment policies have a “statistically significant adverse impact” on a protected group. Minn. Stat. § 363A.28, subd. 10 (2012). The employer then has the burden to produce evidence that the practice is “manifestly related to the job or significantly furthers an important business purpose,” and the plaintiff must finally demonstrate that a comparably effective practice exists that

would have a significantly lesser impact on the protected class. *Id.*; see also *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 155 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002).

Ludwig sought to establish age discrimination based on disparate treatment—using both the direct method and the *McDonnell Douglas* framework—and based on disparate impact. She challenges the district court’s summary judgment on all three grounds. She also asserts that the district court erred by concluding that her proffered evidence of a statement made by Lentz was inadmissible hearsay and by rejecting her expert statistical evidence as nonprobative in addressing her claims.

A. *Direct method*

The district court stated that “[t]he closest thing to affirmative evidence offered by Ms. Ludwig” was Lentz’s statement, which it rejected as hearsay and a stray remark. The district court then concluded that Ludwig failed to establish a genuine issue of material fact under the direct method as to whether Epiphany had a discriminatory motive in terminating her. See *Friend*, 771 N.W.2d at 37; *Troupe*, 20 F.3d at 737 (stating that a plaintiff may avoid summary judgment by providing pieces of evidence that “together compos[e] a convincing mosaic of discrimination against the plaintiff”).

Ludwig argues that she presented sufficient circumstantial evidence to create a genuine issue of material fact of discriminatory intent including: (1) the terms of Epiphany’s VSP; (2) Lentz’s alleged statement; (3) the 2009 RIF data; (4) the principal’s statement that she wanted employees who could grow with her for a long time, and the resulting young age of Epiphany’s new hires and transferees; and (5) the timing of

Ludwig's less positive reviews and placement of negative material in her file. Ludwig is correct that "a discrimination claim can be pursued under the direct method using circumstantial evidence." *Friend*, 771 N.W.2d at 40; *see also Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) (stating that the appropriate focus under the direct method "is not whether the evidence offered is direct or circumstantial but rather whether the evidence points directly to a discriminatory reason for the employer's action") (quotation omitted). The district court's analysis, however, appears to focus solely on Ludwig's direct evidence, to the exclusion of the circumstantial evidence she submitted.

But we may affirm a district court's grant of summary judgment if it may be sustained on any grounds. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). We therefore examine whether Ludwig's proffered direct and circumstantial evidence was sufficient to create a material factual issue regarding "affirmative evidence of discriminatory motive," *Friend*, 771 N.W.2d at 38; in other words, evidence "from which a rational trier of fact could reasonably infer that [Epiphany] had fired [her] because [she] was a member of a protected class." *Troupe*, 20 F.3d at 737.

#### *Epiphany's VSP*

Ludwig argues that the VSP portion of the RIF provides evidence of intentional discrimination because it was based in part on age. But as the district court noted, a voluntary program such as the VSP gives employees a choice to accept a separation offer with incentives, but does not require them to participate. *See Shea v. Hanna Mining Co.*, 397 N.W.2d 362, 369 (Minn. App. 1986) (stating that "[a]lthough an employer in a

workforce reduction cannot force older employees to accept an early retirement program, an employer can offer additional incentives to encourage its employees to accept such a program”). Ludwig points out that she declined to accept the VSP offer and maintains that a program intentionally targeted at older employees to coerce retirement may provide evidence of age discrimination. *See, e.g., Kneisley v. Hercules, Inc.*, 577 F. Supp. 726, 729 (D. Del. 1983) (noting that plaintiff’s allegations that his employer provided an ultimatum either to accept an early retirement program or face demotion and a pay reduction were sufficient to state a cause of action for age discrimination). But Ludwig has presented no evidence that she received an ultimatum to accept the VSP or be discharged. And Epiphany replaced her with an older employee who had received a more favorable performance review. Under these circumstances, neither the terms nor the circumstances surrounding the implementation of the VSP raises a logical inference that Epiphany targeted Ludwig based on her age to coerce her retirement, and the VSP does not present a genuine issue of material fact as to intentional age discrimination. *See, e.g., Shea*, 397 N.W.2d at 369 (concluding that district court properly rejected age-discrimination claim when employee who was demoted after rejecting early-retirement offer failed to present evidence of pretext or discriminatory motive).

*Lentz’s remark*

The district court declined to consider Lentz’s alleged remark, “Out with the old,” made to another employee when he handed out papers relating to the VSP. The district court concluded that evidence of the statement was hearsay, and, even if admissible,

amounted to a stray remark, which was not probative of intent to discriminate based on age.

We agree with Ludwig that the district court improperly treated the statement as hearsay. Because Lentz was involved as a decisionmaker in her discharge, the statement amounts to an admission of a party opponent, which is not hearsay. *See* Minn. R. Evid. 801(d)(2)(A) (stating that admission of party opponent is not hearsay). Nonetheless, we conclude that the district court did not err by characterizing it as a stray remark, which is not probative of intentional discrimination. “Stray remarks made in the workplace cannot serve as direct evidence of discrimination.” *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997); *see, e.g., Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1152–53 (8th Cir. 2007) (rejecting supervisor’s alleged statement that he wanted to hire “young studs” to replace the older sales people as direct evidence of age discrimination). Lentz’s single, general remark occurred several months before Ludwig’s discharge and related to the VSP, which was a voluntary retirement program. Given this context, the district court did not err by concluding that it did not raise a genuine issue of material fact as to the “affirmative evidence” of intent to discriminate required to resist summary judgment. *Friend*, 771 N.W.2d at 38.<sup>1</sup>

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<sup>1</sup> We reject as moot Ludwig’s additional argument that the district court abused its discretion by denying her motion, made after the close of discovery, to conduct additional discovery from another witness who allegedly heard Lentz’s statement. Given the district court’s analysis of the remark, its corroboration would not have assisted the court or changed the result on summary judgment. *See McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. App. 1985) (stating that when additional discovery would not assist the district court or change the result of a summary-judgment motion, the district

### *Statistical evidence*

In considering whether Epiphany's stated reason for terminating Ludwig was pretextual, the district court concluded that Ludwig's statistical evidence from two experts was not "competent evidence from which a trier of fact could reasonably infer discriminatory intent." Ludwig argues that the district court improperly weighed evidence by determining on summary judgment that her statistical evidence was not worthy of belief. But the district court's language, although imprecise, reflected its assessment that Ludwig's statistical evidence failed to show a genuine issue of material fact sufficient to withstand summary judgment, either as to pretext under a *McDonnell Douglas* standard of proof or discrimination based on a disparate-impact theory. *See, e.g., Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 959 (8th Cir. 2001) (concluding in age-discrimination case that appellant's statistics were "insufficient to create a material issue of fact as to pretext").

A party in an age-discrimination case who bases an argument on statistical data must show that the findings are statistically significant. *Albertson v. FMC Corp.*, 437 N.W.2d 113, 117 (Minn. App. 1989) (stating that "mere recitation of statistics" was not probative of pretext, absent evidence that the statistics "indicate[d] a meaningful phenomenon"); *cf. Hamblin*, 636 N.W.2d at 155 (concluding that statistical evidence, in combination with evidence of a discriminatory corporate culture, a lack of uniformity in ranking, and the affected employee's sharp drop in ranking, was sufficient to raise a

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court does not abuse discretion by granting summary judgment without granting a continuance), *review denied* (Minn. Dec. 30, 1985).

genuine issue of material fact as to pretext). “[I]n order for statistical evidence to be probative of pretext, it must analyze the treatment of comparable employees.” *Evers*, 241 F.3d at 958. Statistics fail to analyze the treatment of comparable employees if they have “grouped all employees together regardless of specialty or skill and failed to take into account nondiscriminatory reasons for the numerical disparities.” *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987 (10th Cir. 1996).

Ludwig’s expert Michael O’Day opined that the VSP and the RIF showed a statistically significant difference in discharge rates between older and younger workers with respect to Epiphany school employees as a whole, with older Epiphany employees disproportionately discharged under the RIF based on the four-fifths rule. *Cf.* 29 C.F.R. § 1607.4(D) (2012) (noting that “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will be generally regarded by the Federal enforcement agencies as evidence of adverse impact”). Ludwig’s second expert, Lisa Lendway, performed a statistical analysis of the VSP and RIF as applied to all Epiphany school employees and concluded that the expected odds of being in both groups increased with age. But neither expert performed a separate statistical analysis for Epiphany teachers alone because of the small sample size; O’Day stated only that anecdotal evidence supported an overall conclusion that older workers were disproportionately discharged under the RIF.

Because O’Day’s and Lendway’s statistical analyses related to Epiphany employees as a whole, who had different job duties and skills than Epiphany teachers, it did not analyze the treatment of comparable employees. Further, as the district court

noted, the four-fifths rule has traditionally been applied to cases of race and sex discrimination. *See* 29 C.F.R. § 1607.4(D). And “when the number of applicants is 25 or fewer, the results from the four-fifths rule are not considered reliable.” *Kohn*, 583 N.W.2d at 13 (considering statistical evidence presented in disparate-impact case); *see also EEOC v. New York Times Broad. Serv., Inc.*, 542 F.2d 356, 360 (6th Cir. 1976) (stating that “statistical evidence is of much greater value in discrimination cases where large numbers of employees are involved and fewer subjective personalized factors are considered”). Here, O’Day observed only anecdotal evidence of differing treatment based on age in the small group of Epiphany teachers. Therefore, the district court did not err by concluding that Ludwig had failed to adequately show the statistical significance of her experts’ conclusions.

Ludwig also contends that the correlation between age and salary at Epiphany gave Epiphany an incentive to terminate older workers in its RIF, given the stated goal of reducing overhead. But this correlation, without additional evidence that age was a factor in her discharge, does not tend to show age-based discrimination. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct. 1701, 1706 (1993) (stating that “[w]hen the employer’s decision is wholly motivated by factors other than age, the problem of [age discrimination] disappears. This is true even if the motivating factor is correlated with age . . .”).

#### *Negative performance reviews*

Ludwig maintains that the placement of negative information in her employment file after her discharge and a drop in her performance rating immediately before the RIF

provide probative evidence of intentional age discrimination. *See, e.g., Hamblin*, 636 N.W.2d at 155 (concluding that a “sharp drop” in an employee’s ranking, along with other evidence, sufficiently raised an issue of material fact as to pretext under the *McDonnell Douglas* test). Ludwig presented evidence that, although her previous evaluations had been outstanding, Carroll gave her a 2009 evaluation indicating that her performance did not meet Carroll’s “vision and what excellence is in a school” and “current thinking.” But the record also reflects that Epiphany had introduced a new rubric for teaching and that Ludwig’s 2008 performance review directed her to develop additional skills of using small group instruction, differentiating instructions for “at risk” students, and developing effective ways to handle student behavior. And in 2009, Ludwig received a “needs improvement” rating in four of eight teaching elements, with a notation that she “[c]onsistently demonstrates rigid, negative responses to feedback or change.” Ludwig’s negative evaluation in areas relating to the teaching rubric reflects an objective performance-related reason to discharge her in connection with implementation of the RIF, and it negates an inference that Epiphany discharged her based on age. *Cf. Wingate v. Gage Cnty. Sch. Dist.*, 528 F.3d 1074, 1080 (8th Cir. 2008) (rejecting an inference of age-based discrimination when the employer did not rely exclusively on subjective criteria, but also considered objective criteria, in failing to hire plaintiff).

*Preferential ranking, transferring, and hiring of younger employees*

Ludwig also argues that Epiphany lacked uniformity in ranking her under the RIF and applied its terms in a way that favored younger employees. She maintains that, unlike its procedure for other employees, Epiphany used only the last three years of

evaluations in evaluating her under the RIF and did not apply listed criteria of “seniority” or “performance.” But Lentz testified that, in evaluating performance under the RIF, Epiphany utilized the last three to five years of employee evaluations, which is consistent with evaluating her based on the past three years of performance. And Ludwig’s separation letter stated as reasons for discharge her limited licensure, past performance issues, and her status as the least senior junior-high language-arts teacher. Therefore, this argument lacks merit.

Ludwig also maintains that, in general, Epiphany hired younger employees and that Carroll made statements that constituted affirmative evidence of discrimination: that in hiring teachers, she was looking for someone familiar with “current thinking in the field” and who could “attract enrollment,” and that in implementing an RIF, the administration looked to “the future vision of the school.” But based on the new teaching rubric at Epiphany, we cannot conclude that Carroll’s statements are probative of intentional age discrimination.

Ludwig argues that Epiphany had a practice of shifting younger employees into other positions, yet Epiphany declined her request to transfer, which supports an inference of age discrimination. *See Troupe*, 20 F.3d at 736 (noting that circumstantial evidence of intentional discrimination may be proved by an employer’s systematically better treatment of other employees who are similarly situated except for protected characteristic). Although Epiphany transferred two younger workers, there were open positions that fit their qualifications and experience, which was not true in Ludwig’s case. Thus they were not similarly situated to Ludwig. *See Torgerson v. City of Rochester*, 643

F.3d 1031, 1051 (8th Cir. 2011) (noting that the requirement that those supposedly given preferential treatment must be similarly situated to the plaintiff “in all relevant respects” to constitute discrimination is a “rigorous” standard) (quotation omitted), *cert. denied*, 132 S. Ct. 513 (Oct. 31, 2011). And Epiphany’s offering one younger teacher a position for which he was not licensed does not tend to show systematic age-based discrimination when the school retained another competent sixth-grade teacher, older than Ludwig, to teach language arts.

Ludwig argues that, because the district court assumed, without deciding, that she had met the requirements of a prima facie case under the *McDonnell Douglas* framework, she necessarily met her burden to show a genuine issue of material fact as to discriminatory intent under the direct method of proof. We reject this argument. The burden of producing evidence to make out a prima facie case does not equate to a plaintiff’s ultimate burden of proving discrimination based on membership in a protected class. *See Wilking v. Cnty. of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) (“At all times, the plaintiff bears the ultimate burden of demonstrating that discrimination was the real reason for the employer’s actions.”); *see also Venturelli v. ARC Cmty. Servs.*, 350 F.3d 592, 601 (7th Cir. 2003) (stating that “[c]ircumstantial evidence under the direct method . . . must allow a jury to infer more than pretext; it must itself show that the decisionmaker acted because of the prohibited animus.”). We conclude that, based on the record as a whole, Ludwig failed to present sufficient evidence of discriminatory motive required to withstand summary judgment on her discriminatory treatment claim based on the direct method of proof. *See Goins*, 635 N.W.2d at 722 (stating that under the direct

method, “[p]roof of discriminatory motive is critical”). We therefore decline to disturb the district court’s conclusion on summary judgment relating to that claim.<sup>2</sup>

*B. McDonnell Douglas analysis*

We next examine Ludwig’s assertion that the district court erred by granting summary judgment on her disparate-treatment claim under the *McDonnell Douglas* analysis. The district court stated that it had assumed, without deciding, that Ludwig had met her burden to show a prima facie case and noted that her “additional evidence” under the fourth prong was the same as she used to show pretext under the third step of the *McDonnell Douglas* inquiry.<sup>3</sup> The district court then concluded that Epiphany had met

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<sup>2</sup> Ludwig argues that the district court erred by citing the direct-evidence evidentiary standard enunciated in *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (stating that evidence submitted under direct method must show “a specific link between the alleged discriminatory animus and that challenged decision, sufficient to support a finding by a reasonable fact finder that the illegitimate criterion actually motivated the adverse employment action”) (quotation omitted). The main holding in *Griffith* is that the United States Supreme Court’s holding in *Desert Palace v. Costa*, 539 U.S. 90, 98–101, 123 S. Ct. 2148, 2153–55 (2003)—that circumstantial as well as direct evidence could support a Title VII, mixed-motive, disparate-treatment claim—did not modify the summary-judgment standard in cases litigated under the *McDonnell Douglas* framework. *Griffith*, 387 F.3d at 736. But the *Griffith* holding has been criticized for its articulation of an arguably higher quantum of proof for direct-evidence cases. See *Torgerson*, 643 F.3d at 1053 (Colloton, J., concurring) (stating that “confusion . . . has arisen from efforts to apply a ‘direct evidence’ standard”). Ludwig argues that this court’s decision in *Friend* states the appropriate, lower standard. See *Friend*, 771 N.W.2d at 39 (citing with approval the direct-method evidentiary standard in *Troupe*, 20 F.3d at 737, which requires a “convincing mosaic” of circumstantial evidence allowing the fact-finder to infer intentional discrimination). We need not resolve this issue because Ludwig failed to present affirmative evidence to show a genuine issue of material fact under either standard.

<sup>3</sup> A court “may skip over the initial burden-shifting of the indirect method and focus on the question of pretext.” *Keeton v. Morningstar*, 67 F.3d 877, 885 (7th Cir. 2012). Evidence of pretext may include the same evidence offered to establish the prima facie claim. *Brennan v. GTE Gov’t Sys. Corp.*, 150 F.3d 21, 28 (1st Cir. 1998). But the

its burden to articulate a legitimate, nondiscriminatory reason for Ludwig's discharge. Finally, the district court concluded that Ludwig had failed to present evidence showing a genuine issue of material fact as to pretext.

Ludwig argues that Epiphany's economic reasons for implementing the RIF could not provide a legitimate, non-discriminatory reason for terminating her unless Epiphany could also show that the RIF was applied in a non-discriminatory manner. But "[t]erminating an employee to reduce costs under a valid RIF plan is a legitimate employment action." *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 883 (Minn. App. 1988). It is undisputed that Epiphany demonstrated financial hardship, which provided a valid basis for terminating Ludwig under the RIF.

Pretext may be shown "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 v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986) (quotation omitted). A plaintiff seeking to establish pretext must produce sufficient evidence from which a rational trier of fact could find that the employer's proffered reason for its employment action was a pretext for unlawful age discrimination. *Harris v. Metro. Gov't. of Nashville*, 594 F.3d 476, 487 (6th Cir. 2010).

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requirements for making the "additional showing" required for a prima facie case and for establishing pretext are distinguishable. *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 778–79 (8th Cir. 1995). "The 'additional showing' inquiry is merely part of the establishment of the prima facie case, the purpose of which is to shift the burden of production to the defendant to provide an explanation for its apparently discriminatory behavior. . . . At the pretext stage, by way of contrast, the question is much more focused: Has the plaintiff shown that the explanation extracted from the defendant by virtue of the prima facie case is a pretext for discrimination?" *Id.*

When considering whether a genuine issue of material fact exists to preclude summary judgment, the district court must consider whether a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). Ludwig argues that the evidence, taken as a whole and viewed in the light most favorable to her, discounts Epiphany’s articulated reason for terminating her. “But to prove pretext, the employee must do more than show that the employment action was ill-advised or unwise, but rather must show that the employer has offered a phony excuse.” *Meads v. Best Oil Co.*, 725 N.W.2d 538, 542–43 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Feb. 20, 2007). We agree with the district court that, on this record, Ludwig’s proffered evidence was simply insufficient to create a genuine issue of material fact as to whether Epiphany’s stated reasons for terminating her—cost savings and retaining a qualified teacher in each subject area—amounted to pretext for a decision impermissibly based on age.

### *C. Disparate-impact claim*

Ludwig argues that the district court erred by granting summary judgment to Epiphany on her disparate-impact claim. As discussed above, the district court properly rejected Ludwig’s statistical evidence, which forms the basis for this claim. *See, e.g., Evers*, 241 F.3d at 958. Ludwig points out that, in assessing whether she made out a prima facie case of adverse impact, the district court was free to examine additional evidence. *See, e.g., Kohn*, 583 N.W.2d at 14 (concluding that district court properly considered additional evidence of discriminatory history against Hispanic firefighters in

determining that firefighters made out prima facie showing of adverse impact). But she has presented no additional evidence which tends to raise a question of material fact on this issue. Even if Ludwig could meet this burden, we would conclude that Epiphany has provided a sufficient business justification for the RIF: its need to eliminate teaching positions based on decreased enrollment and a poor financial situation. *See* Minn. Stat. § 363A.28, subd. 10 (stating that prima facie case may be rebutted with employer’s showing that the practice is related to the job or “significantly furthers an important business purpose”). And finally, we reject Ludwig’s argument that she has presented evidence tending to support her required responsive showing of a comparably effective practice that would “cause a significantly lesser adverse impact on the identified protected class.” *Id.* Although Ludwig maintains that a comparably effective practice would have been to exclude age as a factor under the VSP or to reduce her hours, Epiphany presented evidence that implementing the VSP as to all employees would have created a risk that too many employees would leave, and offering more part-time positions would not have met its need to eliminate positions or accommodate the desire of most employees to work full time. We conclude that the district court did not err by granting summary judgment on Ludwig’s disparate-impact claim.

## II

Ludwig argues that the district court erred by granting summary judgment on her breach-of-contract claim based on the JIE, which, the parties agree, formed a contract that

required just cause for discharge of an employee.<sup>4</sup> “A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). The district court concluded that, based on the terms of the JIE, Ludwig had failed to show a genuine issue of material fact as to breach of that agreement. *See Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (stating that “[a] defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim”).

The goal in construing a contract is to determine and give effect to the intent of the contracting parties. *Karim v. Werner*, 333 N.W.2d 877, 879 (Minn. 1983). “[A] court gives effect to the parties’ intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent.” *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). If that language is “reasonably susceptible of more than one interpretation,” the contract is ambiguous, and its construction presents a question of fact

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<sup>4</sup> Ludwig attempts, given briefing limitations, to incorporate all of the arguments made to the district court in support of her breach-of-contract claim. *See* Minn. R. Civ. App. P. 132.01, subd. 3 (limiting principal briefs to 45 pages with exceptions not relevant here). But we decline to address issues not briefed in this appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived); *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 684 (Minn. App. 1996) (noting that a brief that was at the page limit set by rule 132.01, but which included “45 single-spaced footnotes,” was an “attempt to circumvent the applicable page limits”).

for the jury. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (quotation omitted). “Whether a contract is ambiguous is a question of law,” which this court reviews de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

The JIE provides that, when implementing an RIF, “the employer must decide who will be affected based on valid criteria *such as* past performance, seniority, education, training and work skills needed by the organization.” (Emphasis added.) Ludwig argues that, because Carroll admitted that she did not consider Ludwig’s education, training, or work skills in selecting her for discharge under the RIF, a material factual issue exists as to breach of the JIE. She also maintains that an interpretation of the JIE allowing Epiphany to select which standards to use in considering an employee for discharge under the RIF contravenes the JIE’s just-cause requirement.

The district court concluded that the plain language of the JIE did not require it to consider all of the listed criteria and did not preclude Epiphany from considering additional valid criteria in selecting her for discharge. We agree. As the district court noted, the JIE’s use of the term “such as,” denoting valid criteria for selecting an employee for discharge, indicates that the listed criteria are merely examples of valid criteria. *See Orion Fin. Corp. of S.D. v. Am. Foods Grp., Inc.*, 281 F.3d 733, 739 (8th Cir. 2002) (stating that “[a]n objective reader would interpret the phrase ‘such as’ to mean ‘for example,’” and an interpretation that “such as” excludes other possibilities “is contrary to the plain meaning of the contract”). Because the JIE unambiguously provides that Epiphany must consider “valid criteria” in implementing the RIF, with examples of those criteria, the district court properly concluded that its plain language did not require

Epiphany to consider all possible valid criteria in terminating Ludwig, but permitted it to limit its consideration to Ludwig's seniority and performance reviews.

Ludwig finally argues that Epiphany failed to apply the standards under the JIE uniformly among employees and therefore violated the just-cause provision of that agreement, citing *Deli v. Univ. of Minn.*, 511 N.W.2d 46 (Minn. App. 1994) *review denied* (Minn. Mar. 23, 1994). In *Deli*, this court stated that the jury-instruction definition of just cause "contemplates that an employer treat employees uniformly when applying job standards." *Id.* at 52. But Ludwig's evidence that, unlike other employees, she was not offered the opportunity to move to a different grade level fails to establish a material factual issue on breach of the JIE because those offers related to transfers, which are not covered by the JIE. The district court did not err by granting summary judgment on Ludwig's breach-of-contract claim.

**Affirmed.**