STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0250

Renee Malknecht,
Appellant,

vs.

Independent School District No. 833,
Respondent,

Walter Lyszak,
Respondent.

Filed April 22, 2008
Affirmed
Toussaint, Chief Judge

Washington County District Court
File No. C1-05-4724

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Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Crippen, Judge.*

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

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

In this age- and sex-discrimination action brought under the Minnesota Human Rights Act, appellant Renee Malknecht challenges the district court's order granting summary judgment in favor of respondents Independent School District 833 and Walter Lyszak. Because appellant's sex-discrimination claim was time-barred and the remaining claims are legally unsupportable, we affirm.

D E C I S I O N

On appeal from summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court must view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact must be more than evidence that "merely creates a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A material fact is one that will affect the result or outcome of the case. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). In construing the Minnesota Human Rights Act (MHRA), this court applies Minnesota caselaw and caselaw 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).

The district court granted summary judgment in favor of respondents, concluding that appellant's sex-discrimination and age-discrimination claims were barred by the

statute of limitations. The district court noted that, even if it were to consider the merits of appellant's discrimination claims, both claims would fail as a matter of law. Further, the district court concluded that appellant was not constructively discharged. Appellant argues that (1) her claims were not time-barred, (2) she presented direct evidence of age-discrimination, (3) she established a prima facie case of sex discrimination, (4) she was constructively discharged, and (5) she suffered reprisal for challenging prior conduct.

Appellant challenges the district court's conclusion that her claims of age and sex discrimination were barred by the statute of limitations. Claims under the MHRA must be brought either by filing a complaint with the district court or a "charge" of discrimination with the Minnesota Human Rights Department within one year of the "occurrence of the practice." Minn. Stat. § 363.06, subds. 1, 3 (2000). Appellant filed a charge of discrimination with the Minnesota Department of Human Rights on April 23, 2002. Therefore, absent the application of the continuing violation doctrine, all incidents of discrimination must have occurred after April 23, 2001 in order to be timely. In order to establish a continuing violation of the MHRA, appellant must establish either "a series of related acts, one or more of which fell within the limitations period," or "the maintenance of a discriminatory system both before and during the limitations period." *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1172 (8th Cir. 2001).

Appellant's age-discrimination claim is based on a comment made by Lyszak, the school principal, that it was time for the "young lions" to take over the yearbook adviser position, rather than appellant. This statement was made in May 2001, clearly within the one-year statute of limitations. Thus, the district court erred in concluding that

appellant's age-discrimination claim was barred by the statute of limitations.

Appellant's sex-discrimination claim, on the other hand, is premised entirely on action occurring prior to April 23, 2001. The record shows that the last alleged incident of sexual harassment, which involved Lyszak showing appellant pornography on his computer, occurred in mid to late April 2001. Appellant did not provide a specific date. While the district court ultimately disposed of appellant's sexual harassment claim, it initially treated the April 2001 incident as falling within the statute of limitations, essentially finding that this incident occurred after April 23, 2001. This finding is clearly erroneous and is not supported by the record. Therefore, appellant's sexual harassment claim is time-barred in its entirety and cannot be saved by the continuing violations doctrine because appellant has not established that at least one incident of sexual harassment took place within the statutory period.

Appellant contends the district court erred in concluding that she failed to present sufficient evidence to create a genuine issue of material fact that respondents discriminated against her on the basis of age. The MHRA prohibits employers from discriminating against employees on the basis of age with respect to terms, conditions, or privileges of employment. Minn. Stat. § 363.03 (1)(c) (2000). Minnesota courts typically use the burden-shifting *McDonnell Douglas* framework to determine whether a violation of the MHRA has occurred. *See Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441-42 (Minn. 1983) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)).

But when a plaintiff alleges direct evidence of discriminatory intent, it is not necessary to employ the *McDonnell Douglas* analysis used in indirect-evidence circumstances. *Diez v. Minn. Mining & Mfg*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997). Direct evidence is evidence of conduct or statements by the employer's decisionmakers sufficient to permit a fact-finder to infer that the discriminatory attitude was more likely than not a motivating factor in the employer's decision to adversely affect the employee's employment. *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999) (quotations omitted). "Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference." *Id.* "Stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself will not suffice." *Id.* (quotations omitted).

Appellant contends that Lyszak's statement that he planned on giving the yearbook adviser position to one of the "young lions" rather than to her was direct evidence of age discrimination against her. The district court concluded that the "young lions" comment was not direct evidence of age discrimination but rather a stray remark unrelated to any decision-making process. We agree. It is undisputed that, despite the "young lions" comment, appellant was ultimately offered and accepted the yearbook adviser position. Thus, appellant failed to identify a decision-making process that was adversely affected by Lyszak's comment.

Even if Lyszak's comment were evidence of age animus, appellant would be required to demonstrate "a specific link between discriminatory animus and the

challenged decision." *Stacks v. Sw. Bell Yellow Pages, Inc.*, 996 F.2d 200, 202 n.1 (8th Cir. 1993). Again, appellant ultimately received the yearbook adviser position. Because appellant has not identified a challenged decision, she has failed to present any evidence linking the discriminatory comment to an adverse decision.

Even if appellant's claim of hostile work environment based on sexual harassment were not time-barred, we would conclude that the district court properly granted summary judgment because appellant failed to establish that respondents' conduct was "so severe or pervasive as to alter the conditions of [her] employment and create an abusive working environment." *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001) (quotation omitted). "To clear the high threshold of actionable harm, [appellant] has to show that the workplace is permeated with discriminatory intimidation, ridicule, and insult." *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002) (quotation omitted).

Here, appellant contends that Lyszak engaged in several offensive behaviors: (1) making appellant watch sexual scenes from the movie "American Pie"; (2) showing appellant pornography on his computer; (3) telling appellant that she is known as the local "femi-nazi"; and (4) withdrawing support of appellant's College in Schools program. The district court acknowledged that Lyszak's behavior was "unprofessional, immature, and extremely inappropriate" but that it nonetheless did "not rise to actionable harassment as a matter of law." We agree. While appellant was legitimately offended by Lyszak's behavior, she failed to establish that the incidents were so severe and pervasive as to create an abusive environment. *See, e.g., LeGrand v. Area Res. for Cmty. & Human*

Servs., 394 F.3d 1098, 1100-03 (8th Cir. 2005) (finding no hostile work environment where defendant asked employee to watch pornographic movies with him, hugged and kissed employee, and grabbed employee's buttocks and thigh); *Duncan*, 300 F.3d at 931-35 (finding no actionable hostile environment claim where defendant asked employee to have sexual relationship with him, told employee to sketch sexually objectionable image, asked employee to complete task on his computer where screensaver depicted naked woman, displayed offensive poster, and asked employee to type document containing sexually offensive items).

Appellant contends the district court erred in concluding that she was not constructively discharged. It is undisputed that appellant was not fired by the school district, but instead resigned. "A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination." *Pribil v. Archdiocese of St. Paul and Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995) (quotation omitted). To prove constructive discharge, the employee must show that the employer created the intolerable working conditions with the intention of forcing the employee to quit or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Id.* To successfully claim constructive discharge, an "employee must give her employer a reasonable opportunity to work out the problems prior to resigning." *Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 575 (8th Cir. 1997). "An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged." *Duncan*, 300 F.3d at 935 (quotation omitted).

Here, appellant did not give the school district a reasonable opportunity to improve her working conditions by addressing the problems caused by Lyszak. In fact, appellant did not file her complaint with the school district's human resource department until *after* she resigned. Accordingly, appellant's claim of constructive discharge fails as a matter of law.

Lastly, appellant asserts a claim of reprisal, but her claim is without merit. First, appellant did not raise this issue at the district court level. As a general rule, this court will not consider issues that were not argued and considered in the court below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Further, appellant's briefing on this issue is sorely lacking. This court may decline to reach issues in the absence of adequate briefing or issues that are unsupported by legal analysis or citation. *State, Dept' of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (lack of adequate briefing); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (lack of legal analysis and citation). But even if appellant had properly raised this issue at the district court or on appeal, her claim would fail because she has not demonstrated an adverse employment action, an essential element of a reprisal action. *See DHL, Inc.*, 566 N.W.2d at 71 (holding appellant must show genuine fact issue on all elements of prima facie case to survive summary judgment).

Affirmed.