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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0214**

Susan Kaufenberg,
Appellant,

vs.

Schwan's Home Service, Inc.,
Respondent.

**Filed February 3, 2009
Reversed and remanded; motion to strike deemed moot
Shumaker, Judge**

Lyon County District Court
File No. 42-CV-06-1047

Joni M. Thome, Frances E. Baillon, Halunen & Associates, 220 South Sixth Street, Suite 2000, Minneapolis, MN 55402 (for appellant)

Kurt J. Erickson, Jackson Lewis LLP, 150 South Fifth Street, Suite 1450, Minneapolis, MN 55402 (for respondent)

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant Susan Kaufenberg argues that the district court erred by finding facts and making credibility determinations in granting summary judgment to respondent

Schwan's Home Services, Inc. (SHS) on her claim for retaliatory discharge from employment. We reverse and remand; respondent's motion to strike portions of appellant's reply brief is deemed moot.

FACTS

Appellant Susan Kaufenberg worked for respondent SHS from May 2004 until June 15, 2006, when SHS terminated her employment for allegedly falsifying medical forms at the time of her hire. Kaufenberg admitted that she gave incorrect medical information at the time of her hire, but she contends that it was the product of a mistake and that SHS actually discharged her in retaliation for a workers' compensation claim she made against SHS.

As part of her employment application, Kaufenberg completed a "Medical Examination Report" on May 11, 2004. Under the section of the report designated "Health History," she checked "Yes" in response to the question, "Any Illness or Injury in the last 5 years?" As an explanation, she wrote "Knee arthroscope" on the form. She also checked "No" as to "Spinal injury or disease." In fact, Kaufenberg had sustained a neck injury in June 1999 for which she had surgery in February 2000. In her deposition testimony, she stated that she thought the injury had occurred outside the five-year period about which she was asked but she had been mistaken about the timing. She denied any intention to falsify her medical information.

The district court granted SHS's motion for summary judgment, ruling as follows: "[Kaufenberg] made a fraudulent or intentionally false entry on the Medical Examination Reports Therefore, [Kaufenberg] has not established statutorily-protected conduct

and . . . has failed to establish a prima facie case of retaliatory discharge.” The court noted that “the key date in this case becomes May 11, 1999 and the issue is whether [Kaufenberg] had any other injuries between May 11, 1999 and May 11, 2004.”

The court considered the Medical Examination Report as well as several other documents, including a physician’s affidavit and a workers’ compensation stipulation in concluding that Kaufenberg fraudulently or intentionally falsified her initial report as well as subsequent reports.

D E C I S I O N

On review of a district court’s grant of summary judgment, we examine the record to determine “(1) whether there are any genuine issues of material fact for trial; and (2) whether the trial court erred in its application of the law.” *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 (Minn. 2007) (citation omitted). No genuine issues of fact exist 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). Our reasoning is guided by *Donnay v. Boulware*:

Summary judgment is a “blunt instrument” and should not be employed to determine issues which suggest that questions be answered before the rights of the parties can be fairly passed upon. It should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of the law.

275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966).

Kaufenberg brought suit against SHS, alleging that her discharge from employment violated Minn. Stat. § 176.82, subd. 1, which provides in part that “[a]ny

person discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits is liable in a civil action" (2006). In assessing a claim under this statute, courts apply the three-part *McDonnell-Douglas* analysis. *Snesrud v. Instant Web, Inc.*, 484 N.W.2d 423, 428 (Minn. App. 1992), *review denied* (Minn. June 17, 1992). In a case tried on the merits, a plaintiff must establish a prima facie case consisting of "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983) (citation omitted). If the plaintiff establishes a prima facie case, the employer must then articulate a legitimate reason for the discharge. *Snesrud*, 484 N.W.2d at 427. The burden then shifts back to the plaintiff to show, by a preponderance of the evidence, that the employer's articulated reason was pretextual and that the discharge was for impermissible reasons. *Id.* at 427-28.

The district court ruled that Kaufenberg failed to "establish" a prima facie claim. However, on summary judgment, the employee is not required to "establish" a prima facie claim, but rather must point to admissible evidence that creates a genuine fact issue as to the essential elements of her claim. *See* Minn. R. Civ. P. 56.03 (stating that summary judgment is appropriate when "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 . . ."). Thus, the court erred by requiring that Kaufenberg prove or "establish" her claim at the summary judgment stage.

Furthermore, in concluding that SHS was entitled to judgment as a matter of law, the court improperly made credibility determinations and engaged in fact-finding.

“Weighing the evidence and assessing credibility on summary judgment is error.” *Hoyt Props.*, 736 N.W.2d at 320 (citing *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) (stating that “[i]t is axiomatic that on a summary judgment motion a court may not weigh the evidence”); *Conroy v. Kleinman Realty Co.*, 288 Minn. 61, 66, 179 N.W.2d 162, 165-66 (1970) (stating that the supreme court is “committed to the principle that the credibility of witnesses and the inferences fairly to be drawn therefrom are in the exclusive province of the trier of fact”). Here, the court could only conclude that Kaufenberg “made a fraudulent or intentionally false entry” and that SHS’s “reasons for discharge [were] not pretextual” by choosing to believe SHS’s explanation of events over Kaufenberg’s, thus making credibility determinations. Such determinations are reserved for trial.

“The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH*, 566 N.W.2d at 70. A genuine issue of material fact exists if 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. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). There are multiple questions of fact in this case, most notably on the issues of causation and pretext. For example, Kaufenberg presented a legitimate explanation for the omissions on the Medical Examination Report, and SHS has a self-proclaimed “policy” of not firing people for mistakes. These facts, combined with the

sequence of events leading to Kaufenberg's termination, could reasonably lead a trier of fact to believe that "falsification" of the Medical Examination Report was merely a pretext for terminating Kaufenberg. These are issues of material fact. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976) ("A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution" and precludes summary judgment.). Furthermore, SHS was not entitled to judgment as a matter of law because "dishonesty is not a legitimate reason for terminating employment if this reason is a pretext for discharging the employee in retaliation for seeking workers' compensation benefits." *Randall v. N. Milk Prods., Inc.*, 519 N.W.2d 456, 460 (Minn. App. 1994). Thus, the district court erred in granting summary judgment, and its decision must be reversed. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 330 (Minn. 2004) (stating that a reviewing court will reverse a grant of summary judgment and remand for trial if there are genuine issues of material fact).

Because we are remanding, we find it unnecessary to reach the other issues raised in this appeal. We offer no opinion on the merits or continued viability of these issues, but rather return them to the district court for further proceedings as may be appropriate.

For purposes of summary judgment, the district court ordered certain evidence stricken, and the court denied the appellant's motion to compel discovery. Respondent has moved to strike the portions of appellant's reply brief that address those issues.

The subject matter of the motion to strike raises trial court issues that may be reevaluated in light of the remand. No part of that subject matter was pertinent to our

determination on appeal, and the motion is effectively moot and need not be addressed by this court.

Reversed and remanded; motion to strike deemed moot.