STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0553

Terrance K. Swanson,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 17, 2009
Reversed and remanded
Minge, Judge

Ramsey County District Court
File No. 62-C8-06-010191

James H. Kaster, David E. Schlesinger, Nichols Kaster & Anderson, PLLP, 4600 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for appellant)

Lori Swanson, Attorney General, Alison C. Archer, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

MINGE, Judge

Appellant challenges the dismissal by summary judgment of his whistleblower claims against respondent State of Minnesota. Because the plain language of the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2006), includes "location" in the

definition of an adverse employment action and because we conclude that there are material questions of fact regarding causal connection, we reverse the district court's grant of summary judgment and remand.

FACTS

In 2006, appellant Terrance Swanson sued respondent State of Minnesota claiming he was subject to an adverse employment action based on statutorily protected conduct, and requested relief under both the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2004), and the Minnesota Occupational Safety and Health Act (MNOSHA), Minn. Stat. § 182.654 (2004).[1] Prior to this suit, appellant was employed as a safety investigator for the Occupational, Safety and Health Division (OSH) of the Minnesota Department of Labor and Industry (DLI) and had been working for 16 years out of his home office in Babbitt.

In 2005, appellant was assigned to investigate a serious injury at a power-generation facility in Duluth. Appellant created an investigatory file on Minnesota Power and Light (Minnesota Power), the company that owned and operated the facility. Appellant asserted in his complaint that respondent knew he was investigating Minnesota Power. The investigation was completed in early 2006, and appellant concluded that Minnesota Power was one of the parties at fault for the accident and recommended issuance of a citation. OSH rejected appellant's recommendation because Minnesota

[1] The district court's opinion and appellant's and respondent's briefs focus entirely on the whistleblower statute and the general standard for a prima facie case of retaliatory discharge. Because no argument was made regarding the applicability of MNOSHA or the distinction between the MNOSHA and the Minnesota Whistleblower Act, we do not separately address appellant's claims under MNOSHA.

Power participated in a program that exempted it from citations in exchange for its commitment to observe more exacting safety standards than required by MNOSHA. Appellant asserts that, despite Minnesota Power's exemption from citations, it is appropriate in certain situations for a narrative account of the employer's involvement in an accident to be entered into a file. Respondent asserts that exempt companies are not subject to inspections resulting from a serious injury to an employee.

The parties disagree on how this Minnesota Power file was to be treated. Appellant states that he was informed by OSH that the narrative file on Minnesota Power would remain open. Respondent, however, asserts that appellant opened the file in direct violation of an OSH directive and that the OSH management team decided the proper course of action was to remove the federal tracking number and to locate the physical file in the St. Paul office. Appellant searched the OSH database for the file, and, finding nothing, asked a supervisor about the file. Appellant alleged that he was told that the file was "gone" and that he should tell anyone who inquired that the file never existed. Appellant then e-mailed the temporary OSH director to inform him that it was his belief that discarding the file was a violation of state and federal law. This e-mail was dated May 4, 2006.

On June 5, 2006, OSH notified appellant that he was to be laid off and his home office closed or, as an alternative, appellant could accept a position in OSH's Duluth office. Appellant claims that these actions were in retaliation for his statutorily protected conduct from May 4, 2006 and earlier, good faith conflicts with his supervisors regarding other inspections. Appellant supports this argument by reciting various prior conflicts

and identifying certain OSH actions in early 2006 that indicate OSH's commitment to his continued use of a home office. These actions include the expenditure of funds to upgrade the technology at appellant's home office and a request that appellant sign up for internet service which required a one-year contract. Appellant points out that OSH had approved the internet installation at his home in April 2006.

Respondent asserts that the decision to close appellant's home office was made prior to appellant's statutorily protected conduct. According to respondent, DLI began to review the advisability of allowing safety investigators to work from home as early as 1999 and decided to work toward locating safety investigators in shared office space. Respondent asserts that the decision to close appellant's home office was made based on economic and non-economic factors such as access to technology, peer mentoring, and training. On May 18, 2006, the supervisor of OSH safety inspections issued a memo to the assistant director of DLI urging closure of appellant's and another home office and outlining the economic reasons supporting the requested closures.

According to appellant, closing his home office and requiring that he office in Duluth has been devastating for him and his family. He claims that the transfer requires him to drive 105 miles each way to and from work and, that as part of his transfer, the territory that he is required to cover has expanded.

In August 2006, appellant commenced his whistleblower action. Respondent answered and moved for summary judgment. The district court concluded that appellant engaged in statutorily protected conduct by informing, in good faith, the director of OSH compliance that he believed the destruction of the Minnesota Power file was a violation

of the law and that based on this conclusion, appellant established the first element of a prima facie case for retaliatory discharge.[2] However, the district court further determined that closure of the home office was not an adverse action and that there was no causal connection between the statutorily protected conduct and the closure of the home office. Based on these determinations, the district court concluded that appellant was unable to establish a prima facie case of retaliatory discharge and granted summary judgment dismissing appellant's claims. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). These conclusions are reviewed de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

[2] Appellant's complaint alleged additional acts of statutorily protected conduct. However, because appellant did not challenge the district court's determination that the only instance of statutorily protected conduct was appellant's conduct regarding the Minnesota Power file, we do not address the other alleged instances of statutorily protected conduct.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). This court reviews the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The Minnesota Whistleblower Act states that an employer cannot:

> discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, *location*, or privileges of employment because:
>
> (a) the employee, or a person acting on behalf of an employee, 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 (2004) (emphasis added).

Whistleblower retaliation claims are analyzed under the *McDonnell-Douglas* burden-shifting test. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). In order to make out a prima facie case of retaliation under the Minnesota whistleblower statute, an employee must demonstrate (1) statutorily protected conduct by the employee; (2) an adverse employment action by the employer; and (3) a causal connection between the statutorily protected conduct and the adverse employment action. *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005). If an employee can establish a prima facie case, "the burden of production then shifts to the employer to articulate a legitimate, non-retaliatory reason for its action." *Cokley*, 623 N.W.2d at 630. The employee may then demonstrate that the employer's justification is pretextual. *Id*. The overall burden of persuasion remains with the employee. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 430 (Minn. 1983).

I.

The first issue is whether the closure of appellant's home office, transfer of his office to Duluth, and increase in his territory constituted adverse employment action. In concluding that these actions did not constitute such adverse action, the district court relied on the standard adopted by the federal courts in the context of retaliation claims brought under Title VII of the Civil Rights Act.

Title VII makes it unlawful for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a) (2008). In contrast, the language of the Minnesota Whistleblower Act is more specific and states that an employer cannot "penalize an employee regarding the employee's . . . *location* . . . of employment" because the employee, in good faith, reports a suspected violation of the law. Minn. Stat. § 181.932, subd. 1 (emphasis added). In contrast to the Title VII language regarding retaliation, Minnesota law expressly states that an adverse employment action includes the transfer of an employee's *location* of employment. Although federal and state courts examining alleged adverse employment actions under the various whistleblower acts have not addressed the differences in the language of Title VII and the Minnesota Whistleblower Act, Minnesota courts have an obligation to apply this state's statutes as they are written, not to apply a statute as if it uses the language of counterpart federal law.

We recognize that this court has relied on the federal definition of an adverse employment action determining a retaliation claim under the whistleblower statute. *See,*

e.g., Leiendecker v. Asian Women United of Minn., 731 N.W.2d 836, 842 (Minn. App. 2007). However, *Leiendecker* did not address the specific issue presented in this case regarding the transfer of an employee's location of employment. Further, we note appellant asserts that he faces a hardship based on the location of his home, the difficulty of selling his home, and the distance he must drive to the Duluth office. This is a factual question.

Because the plain language of the statute indicates that a change in an employee's "location" can constitute an adverse employment action and because closure of appellant's home office is not a minor change in working conditions, we conclude that the district court erred in granting summary judgment based on the second element of a prima facie case of retaliation. Because a question of fact remains as to whether the location change was a positive or negative change for appellant, we remand.

II.

The second issue is whether there was a causal connection between appellant's statutorily protected conduct and OSH's alleged adverse employment actions. Minnesota has recognized that "retaliatory motive is difficult to prove by direct evidence and . . . an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley*, 623 N.W.2d at 632. A causal link cannot be shown if the employer is not aware of the statutorily protected activity. *Wolf v. Berkley Inc*., 938 F.2d 100, 103 (8th Cir. 1991).

Close, temporal proximity between an alleged whistleblower report and a termination decision may be sufficient circumstantial evidence supporting an inference of

retaliatory motive. *See Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 445 (Minn. 1983) (stating the causal connection may be demonstrated indirectly by "showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time"). "However, although an inference of discrimination can be drawn when the conduct and termination are close in time, usually more than a temporal connection is necessary to create a genuine fact issue on retaliation." *Freeman v. Ace Telephone Ass'n*, 404 F. Supp. 2d 1127, 1141 (D. Minn. 2005); *see also Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 332 (Minn. App. 2007) (finding no casual connection where the timing of the termination was in close proximity but the termination was a foregone conclusion.)

Here, the district court held that there was no causal connection because (1) the decision to close the office had been made prior to appellant's May 4, 2006 e-mail and his statutorily protected conduct; and (2) the final approval to close the office was made by the commissioner of DLI who was unaware of appellant's whistleblowing activities.

Appellant argues that, although there had been discussion of the department's desire to close home offices as early as 1999, the decision to close appellant's home office was made after appellant's statutorily protected activities. Appellant recognizes that there may have been an intent to close the home office in the future, but argues that: (1) there is conflicting deposition testimony between department officials regarding who made the decision to close the home office and when; (2) the memo requesting official approval for the closure was not submitted until after appellant's statutorily protected conduct; (3) the official authorization to effect the closure was made after his protected

conduct; (4) appellant was given approval to sign a one-year contract for DSL internet service for his home office and have it installed on May 23, 2006; and (5) the decision appeared rushed because the Duluth office was not ready for him when he arrived.

Appellant acknowledges that, in his case, the formal decision to close his home office was approved by a new agency head who would have no apparent retaliatory motive. However, appellant argues that caselaw from the Eighth Circuit and other federal courts holds that a retaliatory decision is not cleansed of its retaliatory motive when the decision is approved of by a neutral party. *See, e.g., Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994) (holding the fact that the discriminatory person did not "pull the trigger" on appellant's termination "of little consequence" when the discriminatory actor was involved in the process); *Vaughn v. Edel*, 918 F.2d 517, 523 (5th Cir. 1990) (stating "[t]his circuit will not sterilize a seemingly objective decision to fire an employee when earlier discriminatory decisions have infected it."). Appellant argues the commissioner only approved the decision already made by supervisors who knew of the statutorily protected conduct.

We recognize that, if we were reviewing a trial record, the record would be adequate to sustain a final decision adverse to appellant. However, we are not reviewing a trial record. Instead, on appeal from summary judgment, we view the evidence in the light most favorable to the appellant. This record indicates that there remain genuine issues of material fact as to whether the alleged adverse employment action is casually related to appellant's statutorily protected conduct. Because the inconsistencies in the

testimony and the timing of the decision to close appellant's home office present a factual question of retaliation that must be determined at trial, we reverse and remand.

Reversed and remanded.

Dated: