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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1325**

Douglas Crosby,
Appellant,

vs.

State of Minnesota, et al.,
Respondents.

**Filed June 9, 2009
Affirmed
Minge, Judge**

Ramsey County District Court
File No. 62-C9-07-001526

William J. Mavity, Merchants Bank Building, Suite 209, 2835 South Service Drive, Red Wing, MN 55066 (for appellant)

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

UNPUBLISHED OPINION

MINGE, Judge

Appellant Douglas Crosby was employed by respondent Minnesota Department of Labor and Industry (DLI) as an inspector for the Occupational Safety and Health Office (OSH). Appellant sued DLI and respondents Patricia Todd and Jeff Isakson, officials

with OSH, for wrongful discharge. Appellant challenges the district court's grant of summary judgment in favor of respondents. Summary judgment was based on the conclusions that (1) appellant failed to demonstrate a prima facie case of retaliatory discharge under the Minnesota Whistleblower Act and the Minnesota Occupational Safety and Health Act (MOSH Act); and (2) appellant failed to demonstrate a prima facie case of retaliatory discharge under 28 U.S.C. § 1983 based on protected speech. We affirm.

FACTS

Appellant was a DLI/OSH employee at an office in Bemidji, where he also maintained his home. Appellant alleges that as a part of two separate OSH investigations in April and May of 2006, he was asked to make changes to his files and recommendations. In the Ames Concrete investigation, appellant states that his direct supervisor agreed with his findings and that the findings supported the issuance of citations against the Ames Concrete Company. However, appellant states that at the direction of Jeff Isakson, the OSH director, the citations were rescinded and no penalties were assessed. Appellant testified that, in discussing the Ames citations, appellant told his direct supervisor and his acting supervisor (when the direct supervisor was on vacation) that he believed Isakson's decision to change the documentation in the case file violated state law.

The other investigation was of the death of an employee at an Eagles Aerie facility. Eagles Aerie is a fraternal organization. Appellant was responsible for the Minnesota OSH investigation of that incident. Appellant alleges that in May 2006, as a

part of his investigation, he reported violations of the MOSH Act and that his supervisor instructed him to complete his work and cite the Eagles Aerie for a violation of an MOSH-stair-rail standard but not assess a \$25,000 fine. Appellant believed that he could not close the investigation and make any violation/fine determinations until he received the results of toxicology tests on the deceased employee from the coroner's office. Appellant stated that he refused to follow his supervisor's instruction because he believed it violated Minn. Stat. § 182.667 (2004) and that he informed his supervisor of his refusal and the reason.

On June 5, 2006 appellant was notified that the Bemidji OSH office was being closed and relocated to St. Cloud "to better meet [the department's] business needs" and appellant was given the option of accepting an "identical" position in MOSH's St. Cloud office or at an office in Duluth or being laid off. Appellant accepted the position in the St. Cloud office. Appellant argues that his refusal to follow the instructions in the Ames and Eagles Aerie investigations and his report to his supervisor that the instructions violated the law were all protected conduct and that the Bemidji office was closed in retaliation for this protected conduct.

Later, in June 2006, appellant wrote to his State Representative Frank Moe and to U.S. Congressman Collin Peterson. Appellant reported that DLI was punishing him for his report of illegal activity by his supervisors and that the DLI decision to close the office was damaging OSH operations in Northwest Minnesota. OSH director Isakson and DLI Commissioner Brener stated in depositions that appellant's complaint letters to

the elected officials were outside his regular job duties and that they recognized that appellant had the right to contact these officials.

Appellant was not given an annual salary step increase in January 2007. Appellant argues that this denial was in retaliation for his protected conduct. Further, appellant argues that his job duties, schedule, and responsibilities were negatively changed in retaliation for his protected conduct. In January 2007, appellant brought four claims against State of Minnesota, OSH compliance director Patricia Todd, and her successor, OSH compliance director Isakson (collectively respondents). These claims are: (1) retaliation in violation of the Minnesota Whistleblower Act, Minn. Stat. § 181.932, subd 1 (2004); (2) retaliation in violation of the Minnesota Occupational Safety and Health Act (MOHS Act), Minn. Stat. § 182.654, subd 9 (2004); (3) deprivation of right to free speech (42 U.S.C. § 1983); and (4) tortious interference with appellant's union employment contract. Respondents moved for summary judgment on all four claims. Appellant moved to strike certain filings by respondent in support of their motion. The district court did not rule on the motion.

The district court granted summary judgment on all claims. With respect to the MOSH Act and whistleblower claims, the district court determined that appellant did not establish a prima facie case that he engaged in statutorily protected conduct, or that he was subject to an adverse-employment action, or that there was a casual connection between the alleged retaliatory action and the alleged protected conduct. As a result of these determinations, the district court held that appellant could not maintain his action for retaliation. With respect to appellant's protected-speech claim, the district court ruled

that appellant did not allege a prima facie case that he engaged in constitutionally protected speech. Except for the dismissal of his claim for tortious interference with union activity, appellant challenges all the summary judgment rulings. Appellant also challenges the district court's refusal to rule on his motion to strike.

DECISION

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 matters are reviewed de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). “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, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). 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).

[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.

DLH, 566 N.W.2d at 71. 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). However, under the *McDonnell-Douglas* burden-shifting

analysis, a claimant has the initial burden of establishing a prima facie case of retaliatory discharge. See *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), review denied (Minn. May 15, 2001) (adopting the *McDonnell-Douglas* analysis); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973) (holding the plaintiff must carry the initial burden of establishing a prima facie case).

I.

The first issue is whether the district court erred in determining that appellant failed to establish a prima facie case of wrongful retaliation under the Minnesota Whistleblower Act or the MOSH Act. The Minnesota Whistleblower Act prohibits an employer from penalizing an employee with respect to the employee's location of employment because the 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." Minn. Stat. § 181.932, subd. 1. Under the MOSH Act, "[n]o employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted . . . any proceeding or inspection under or related to [the MOSH Act]." Minn. Stat. § 182.654, subd. 9.

Retaliation claims are analyzed under the *McDonnell-Douglas* burden-shifting analysis. *Cokley*, 623 N.W.2d at 630. In order to make out a prima facie case of retaliation, 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).

In order to engage in a statutorily protected activity, appellant must have made a good-faith report that implicates a violation or suspected violation of federal or state law. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000); *see also* Minn. Stat. § 181.932, subd. 1; Minn. Stat. § 182.654, subd. 9. An employee need not identify the specific law that the employee believes was violated “so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee’s complaint . . . and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.” *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002). In examining whether a report was made with good faith, the court examines the purpose of the report at the time the reports were made, in part “to ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim.” *Obst*, 614 N.W.2d at 202.

The district court found that appellant did report to his supervisors what he believed were violations of the law. Appellant asserts that he refused directives to alter reports in 2006 because he felt that such alterations would violate the law. While appellant’s complaint and testimony were about violating MOSH Act related rules and

regulations generally, he only specifies that such alterations violated Minn. Stat. § 182.667. That statute makes illegal anyone's conduct who:

knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter

Minn. Stat. § 182.667, subd. 1. In deposition testimony, appellant stated that he was told to do the following: (1) in the Ames Concrete investigation to rescind citations; (2) in the Ames investigation to insert incorrect information in the OSH file regarding whether or not the company was entitled to exemptions or required to utilize traffic devices; (3) in the Eagles Aerie investigation, to cite a violation of the stair-rail-OSH standard without considering a contributing factor even though the stair-rail system was not the most significant contributing factor to the employee's death; and (4) in the Eagles Aerie investigation, to close the file without a toxicology report, which he felt was necessary to include in the OSH report.

Here, the district court concluded that appellant had made a prima facie case that he was merely told to reword his final report and finish a report early and that appellant had not identified a regulation that he was being told to violate in the performance of his duties. Appellant did not state in his deposition or affidavit that he was told to remove evidence from the files. Appellant failed to state how the instructions he was given by Isakson or others could reasonably be understood to constitute a violation of Minn. Stat. § 182.667. Appellant has not explained how the direct supervisors' instructions made the information in the files "false" or resulted in a misrepresentation. The decision by the

director in connection with the Ames investigation that no violation of the MOSH Act had occurred and to delete a citation and penalties is a managerial decision. There is no showing that this decision constituted an apparent violation of any law. On appeal, appellant has not identified any statutory or regulatory rule that was being violated. Reviewing the evidence in the light most favorable to appellant, we conclude that appellant has failed to meet his burden under the first element of a prima facie case of retaliatory discharge: statutorily protected conduct.¹ Because appellant has failed to articulate how the matters that he reported constituted an apparent violation of the law, we affirm the district court's dismissal of his retaliation claims under the Minnesota Whistleblower Act and MOSH Act.

II.

The second issue is whether the district court erred in determining that appellant failed to establish a prima facie case of retaliation based upon conduct protected by the First Amendment. The elements of a prima facie case of retaliation based on First Amendment protected speech are (1) constitutionally protected speech; (2) an adverse employment action; and (3) a causal connection between the two. *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 878 (8th Cir. 2005) (applying the same test to both First Amendment and Title VII retaliation cases). The same burden-shifting framework of *McDonnell Douglas* that has already been discussed applies in the context of First Amendment claims of retaliation. *Hughes v. Stottlemire*, 506 F.3d 675, 679 (8th Cir. 2007).

¹ Based on this conclusion, we do not reach the question of whether the employer took adverse action against appellant or whether there was a causal connection between the alleged adverse action and alleged protected conduct.

“[T]he First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957 (2006). Persons speaking as citizens about matters of public concern must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. *Id.* at 419, 126 S. Ct. at 1958.

In addressing the question of whether an employee has spoken as a citizen, the United States Supreme Court held that, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Id.* at 421, 126 S. Ct. at 1960. In addressing whether speech was regarding a matter of public concern, the Eighth Circuit Court of Appeals has held that “[w]hen a public employee’s speech is purely job-related, [his] speech will not be deemed a matter of public concern.” *Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999). In contrast, “[m]atters of public concern include matters of political, social, and other concern to the community.” *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000). Speech which “criticizes a public employer in his capacity as a public official” addresses a matter of public concern. *Id.*; see also *Casey v. City of Cabool*, 12 F.3d 799, 802 (8th Cir. 1993) (“Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern.”).

The record reflects that appellant’s complaints to legislators consisted of criticism of DLI’s policies and DLI leadership. In their depositions, OSH officials stated that they

did not believe that appellant's complaints were part of his official duties and that they recognized he had a right to communicate with public officials. We conclude that appellant complained as a citizen to legislators and his complaints were regarding matters of public concern.

Appellant argues that, in retaliation for his protected speech, he suffered adverse action in the form of (1) closure of the Bemidji office; (2) withholding of step increases in salary; (3) a change in his work schedule; (4) poor performance reviews; and (5) the restrictions placed on his ability to perform OSH inspections and investigations. For purposes of analysis, we assume, without deciding, that these constitute adverse employment actions. However, appellant still must show a casual connection between these adverse actions and his protected speech.

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. 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*, 330 N.W.2d at 445. "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). General averments are not sufficient to defeat summary judgment. *DLH*, 566

N.W.2d at 71. In order to demonstrate there is a genuine issue of material fact for trial, appellant must offer specific facts, not mere allegations. *Id.*

Appellant did not introduce any evidence of a direct connection between the protected conduct and adverse action. He relied on circumstantial evidence. In this regard, we note that the closure of the Bemidji office is not relevant. It occurred *before* his letters. The other alleged retaliation occurred significantly after the communications. There is at least a six-month time gap between appellant's protected speech and the denial of his pay increase and modification of his schedule. Without more, this is too attenuated to establish a prima facie case. Appellant argues that the denial of the pay increase and restrictions placed on his job were caused by poor performance evaluations and that the performance evaluations were based on complaints from businesses he had inspected and that the complaints had been solicited by appellant's supervisors immediately after his protected communications.

The deposition testimony and affidavits submitted by respondents indicate that the business complaints were filed prior to appellant's protected speech or during the regular course of conducting closing investigation conferences with employers. Appellant presented nothing other than his own speculation that there had been devious conduct by his supervisors. He did not depose anyone at those businesses or otherwise provide any evidence of such a conspiratorial scheme to compromise him as an employee. Because appellant has failed to introduce any evidence of a causal connection between his protected conduct and the alleged adverse employment actions several months later, we

conclude that the district court did not err when it determined appellant failed to present a prima facie case of retaliation based on protected speech.

III.

The third issue is whether the district court erred in failing to rule on appellant's motion to strike alleged "sham" affidavits and other material. Appellant did not raise this issue in his brief or his statement of the case on appeal. Rather, the issue is first raised in his reply brief. This allows no opportunity for comment by respondents. Issues not raised or argued in appellant's brief cannot be first raised in a reply brief. *Mcintire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

IV.

Finally, on appeal, respondents OSH directors argue that they are entitled to qualified immunity as public officials. Because we conclude that the district court did not err in granting summary judgment dismissing appellant's claims for retaliatory discharge, we do not consider the immunity defense.

Affirmed.

Dated: