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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2125**

Florence Ferguson,
Appellant,

vs.

C/Base, Inc.,
Respondent.

**Filed September 15, 2009
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CV-07-23921

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this appeal from summary judgment, appellant argues that the district court
(1) erred in applying the law to her claim that respondent failed to accommodate her
disability, and (2) erred in concluding that her failure-to-accommodate and

discriminatory-discharge claims both failed because there were no facts indicating that she was a qualified disabled person. Because the undisputed facts demonstrate that appellant was not a qualified disabled person, we affirm.

FACTS

Respondent C/Base, Inc., a container storage depot and transportation company, hired appellant Florence Ferguson as its transportation manager in June 2006. Ferguson was experienced in the transportation industry and knew how to operate Profit Tools, the computer software program that transportation companies, including C/Base, use to manage their business.

On March 13, 2007, Ferguson informed Thomas and Tammie Swanson, the owners of C/Base, that she was pregnant. Shortly thereafter, Ferguson began experiencing nausea. Ferguson continued to work while suffering from the nausea, but in early April her doctor recommended that she take some time off work to rest. Ferguson stayed at home April 3 through April 6, pursuant to her doctor's advice. Ferguson was diagnosed with hyperemesis¹ and admitted to the hospital on April 7. Ferguson's mother telephoned Thomas Swanson (Swanson) the next day and informed him that Ferguson had been admitted to the hospital.

On April 16, Ferguson sent the Swansons two e-mails explaining her health status. She indicated that she was not able to work and did not know when she would be released to go back to work. Three days later, Swanson contacted Ferguson's husband and told him that C/Base was terminating Ferguson's employment; he explained that

¹ Hyperemesis is a pregnancy-related illness that involves persistent nausea and vomiting.

Ferguson's absence from the office created a staffing shortage, which required C/Base to cut back its business and "eliminate the position that was left vacant when [Ferguson] went to the hospital." Ferguson was discharged from the hospital on April 22 and cleared to return to work on May 27.

Ferguson initiated an employment-discrimination action against C/Base, alleging violations of the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.001-.41 (2006). Ferguson alleged that C/Base had engaged in unfair employment practices by discharging her based on her sex and disability and by failing to reasonably accommodate her known disability. She asserted that she would have been able to perform her job while in the hospital if C/Base had provided her remote access to Profit Tools. C/Base moved for summary judgment. The district court granted the motion, concluding that there were no genuine issues of material fact and Ferguson failed to establish a prima facie case that she was a qualified disabled person. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court considers whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party against whom the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"When a motion for summary judgment is made and supported, the nonmoving party must 'present specific facts showing that there is a genuine issue for trial.'" *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Minn. R. Civ. P. 56.05). There is

no genuine issue of material fact when the evidence does not “permit reasonable persons to draw different conclusions.” *Id.* at 71. Genuine issues of material fact may not be established by unverified and conclusory allegations, metaphysical doubts about the facts, *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004), or a “self-serving affidavit that contradicts other testimony,” *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009).

Under the MHRA, it is “an unfair employment practice” for a qualifying employer² to discharge an employee because of sex or disability. Minn. Stat. § 363A.08, subd. 2(2). The MHRA definition of “sex” includes “pregnancy . . . and disabilities related to pregnancy.” Minn. Stat. § 363A.03, subd. 42. It also is an unfair employment practice for a qualifying employer “not to make reasonable accommodation to the known disability of a qualified disabled person.” Minn. Stat. § 363A.08, subd. 6(a). An employee who is subjected to discriminatory discharge or failure to accommodate a known disability may bring a civil action against her employer. Minn. Stat. § 363A.33, subd. 1. But these two claims involve distinct proof schemes.

An employee claiming discriminatory discharge must prove discriminatory intent by either direct evidence or by circumstantial evidence in accordance with the burden-shifting test the United States Supreme Court set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing a prima facie case by showing that she (1) is a

² It is undisputed that C/Base is a qualifying employer.

member of a protected class; (2) was qualified for the position from which she was discharged; and (3) was replaced by a non-member of the protected class. *Id.* Summary judgment is appropriate if the employee fails to establish a prima facie case of discriminatory discharge. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 482 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001).

The *McDonnell Douglas* analysis does not apply to a failure-to-accommodate claim. *See Kammuegger v. Loomis, Fargo & Co.*, 383 F.3d 779, 788 (8th Cir. 2004) (stating “it is not necessary to apply the *McDonnell Douglas* framework to the prima facie case for a reasonable accommodation claim”); *cf. Hoover*, 632 N.W.2d at 545-47 (addressing claims of discriminatory discharge and failure to accommodate separately and applying *McDonnell Douglas* only to discriminatory discharge). An employee claiming that her employer violated Minn. Stat. § 363A.08, subd. 6, need only produce competent evidence that she had a disability, her employer knew of the disability, and her employer failed to make a reasonable accommodation for that disability to defeat summary judgment. *Hoover*, 632 N.W.2d at 547; *see also DHL*, 566 N.W.2d at 71 (“[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.”).

I. The district court erred in applying the *McDonnell Douglas* analysis to Ferguson’s failure-to-accommodate claim.

Ferguson first asserts that the district court erred in its application of the law to her failure-to-accommodate claim. We agree. The district court concluded that summary

judgment was warranted on both of Ferguson's claims because she failed to make a prima facie showing that she was a qualified disabled person. But as discussed above, *McDonnell Douglas* does not apply to failure-to-accommodate claims. And the MHRA specifically provides that if an employee's status as a qualified disabled person is at issue, the employer bears the burden of demonstrating that the employee was not a qualified disabled person. Minn. Stat. § 363A.03, subd. 36; *see Hoover*, 632 N.W.2d at 547 n.10 (recognizing burden on employer). The district court erred in applying *McDonnell Douglas* to Ferguson's failure-to-accommodate claim and in requiring Ferguson to establish that she was a qualified disabled person.

But this error does not necessarily warrant reversal. The district court also determined that there are no genuine issues of material fact regarding Ferguson's status as a qualified disabled person. And while C/Base bears the burden of proving that Ferguson is not a qualified disabled person, Ferguson concedes that she cannot succeed on either her discriminatory-discharge claim or her failure-to-accommodate claim if she was not a qualified disabled person within the meaning of the MHRA. *See Hoover*, 632 N.W.2d at 547 n.10 (noting that failure-to-accommodate claim may be defeated by showing that employee was not a qualified disabled person). Thus, if the district court properly concluded that Ferguson was not a qualified disabled person, its erroneous application of the law does not require reversal of summary judgment in favor of C/Base on both claims. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that

reviewing court “will not reverse a correct decision simply because it is based on incorrect reasons”).³ It is this dispositive issue to which we now turn.

II. The district court did not err in determining that Ferguson was not a qualified disabled person.

A “qualified disabled person” is one “who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question.” Minn. Stat. § 363A.03, subd. 36(1).

A. Essential job functions

Ferguson disputes the district court’s conclusion that there are no genuine fact issues regarding the essential functions of her job. “Essential functions of the job are ‘fundamental job duties,’ and the employer’s judgment in this regard is considered ‘highly probative.’” *Kammueler*, 383 F.3d at 786 (quoting *Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003)). The amount of time an employee spends performing a function is relevant to determining which functions are essential. *Id.* But a job function need not take up an extensive part of the employee’s work day to be considered essential. *Id.*; *Alexander*, 321 F.3d at 727. Regular attendance may be essential to a job, such that an employee who is unable to attend regularly cannot be considered a qualified disabled person. *See Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 809-10 (Minn. App. 1992)

³ Ferguson also contends that the district court erred by failing to address C/Base’s willingness to engage in an “interactive process” to identify a feasible accommodation. *See Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 951-52 (8th Cir. 1999) (requiring employer to engage in “interactive process” to identify appropriate accommodation when disabled person requests accommodation). But because we ultimately conclude that there are no genuine issues of material fact regarding Ferguson’s status as a qualified disabled person, we need not reach this issue.

(finding employee's medically required absences supported determination that employee was not a qualified disabled person because her attendance at work was essential to her job), *review denied* (Minn. Oct. 20, 1992); *see also Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 469 (8th Cir. 2007) (recognizing that regular and reliable attendance is a necessary element of most jobs).

The district court determined that there are no genuine fact issues regarding the essential functions of Ferguson's job as transportation manager and that "the essential functions of her job required regular office attendance." Because Ferguson's own description of her job functions demonstrates that her regular attendance was required, we agree.

Several undisputed facts indicate that Ferguson's presence at work was essential to the performance of her job as transportation manager. Ferguson and all other members of C/Base's operations department (customer-service representatives and dispatchers) have always worked at the office. During her deposition, Ferguson acknowledged that she worked full-time in the office prior to her hospitalization and that it was necessary for her to "be at work to perform the essential functions of [her] job." And Swanson agreed that Ferguson was expected to be in the workplace.

Ferguson contends that this evidence merely indicates past practice and does not indicate that it was essential for her to be at work. In support of her argument, Ferguson points out that she had performed work from home for previous transportation-industry employers through remote access to Profit Tools. But there is no evidence that Ferguson ever used remote access to work from home on a sustained, full-time basis or that any

C/Base employees had remote access to Profit Tools. More importantly, Ferguson acknowledges that she was expected to perform specific tasks, as a member of the operations department and as a manager, that required her presence at work.

Undisputed facts demonstrate two specific business reasons why C/Base requires all members of the operations department to be at work. First, they need to be in the workplace to perform basic but important office tasks that could not be performed elsewhere, such as printing truck drivers' dispatches, receiving fax orders, and sending faxes. It is undisputed that while the printing and faxing operations were not necessary to operating Profit Tools, they were critical to the functioning of the operations department. Second, the operations-department employees need to be in the workplace because their duties are interrelated. There is no dispute that the members of the operations department have always worked as a team, sharing work among themselves in order to timely accomplish tasks in a high-stress, deadline-driven environment.

Ferguson's presence in the workplace was also critical to her ability to fulfill the particular demands of her management position. In that capacity, she was responsible for supervising the employees in the operations department. Ferguson now seeks to diminish her role by suggesting that she was a "glorified dispatcher" and pointing out that the description of her job that Swanson provided to the Minnesota Department of Human Rights did not identify her as a supervisor or manager. But a job description is only one factor. *See Kammueler*, 383 F.3d at 786 (listing written job descriptions as one of five factors that may be considered in determining essential functions). Ferguson has consistently claimed the title "transportation manager" and indicated that she was

“responsible for supervising [the] operations department.” Ferguson acknowledges that she was responsible for “ma[king] sure everything was getting done properly” because she was the only person at C/Base who fully understood how to operate Profit Tools. Ferguson had employees who reported to and consulted with her, and she was responsible for training new employees. Omissions from a job description and Ferguson’s affidavit supporting summary judgment, in which she denied having supervisory responsibility, do not create a fact issue when Ferguson herself has acknowledged that her job required her to supervise and train other employees. *Cf. Griese v. Kamp*, 666 N.W.2d 404, 408 (Minn. App. 2003) (stating that “a party cannot eliminate the damage done in prior evidence by providing later, contradictory evidence”), *review denied* (Minn. Sept. 24, 2003).

The fact that Ferguson could have performed certain of her job functions from a remote location does not change the undisputed fact that her essential job functions required her presence at C/Base. The district court correctly concluded that there are no genuine issues of material fact in this regard. Ferguson’s management position required her to be at the office to perform regular office tasks, to coordinate and cooperate with fellow operations employees, and to train and supervise operations employees.

B. Reasonable accommodation

Reasonable accommodation “may include but is not limited to, nor does it necessarily require: (1) making facilities readily accessible to and usable by disabled persons; and (2) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides

on a temporary or periodic basis.” Minn. Stat. § 363A.08, subd. 6(a). Working from home may, in some instances, be a reasonable accommodation. *Heaser v. Toro Co.*, 247 F.3d 826, 831 (8th Cir. 2001). But the obligation to provide a reasonable accommodation does not require an employer to hire additional employees, redistribute essential functions to other employees, or “make an overall change in its manner of conducting business.” *Id.* at 832; *see also Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Lindgren*, 489 N.W.2d at 809-10.

Ferguson contends that the district court erred in determining that remote access to Profit Tools would not have enabled Ferguson to perform all of her essential job functions. We disagree. As discussed above, Ferguson’s management position required her to be in the workplace. And she specifically acknowledged that she was not able, at the time of her termination, to perform certain specific functions of her job that required her presence in the workplace. She admitted that she would not be able to supervise other employees if she were working remotely and that this aspect of her job would have fallen on Swanson. Ferguson also acknowledged that other operations department employees would have to complete certain office functions that she routinely performed.

And even if Ferguson could have performed some of her essential functions through remote access to Profit Tools, her physician had not released her to work in any capacity prior to C/Base terminating her employment. It is wholly undisputed that Ferguson could not be present in the workplace nor could she identify a return date at the time C/Base terminated her employment.

In the face of her own description of the requirements of her job and the uncontested facts regarding her inability to be at work or to perform her essential job functions remotely, Ferguson's contradictory and conclusory assertion that she would have been able to perform the essential functions of her job does not create a genuine fact issue. *See Dydarl*, 689 N.W.2d at 783; *Griese*, 666 N.W.2d at 408.

Because the undisputed facts show that Ferguson was unable to perform essential functions of her job outside of the workplace, providing her remote access to Profit Tools would not have made her a qualified disabled person within the meaning of the MHRA. Consequently, Ferguson cannot prevail on her discriminatory-discharge and failure-to-accommodate claims. The district court properly granted summary judgment to C/Base.

Affirmed.