STATE OF MINNESOTA
IN COURT OF APPEALS
A09-294

American Building Contractors, Inc.,
Respondent,

vs.

Asset Restoration & Remodeling, LLC,
Defendant,

Clifford D. Kurth,
Appellant.

Filed November 10, 2009
Affirmed; motions to strike granted and
motion for attorney fees denied
Klaphake, Judge

Scott County District Court
File No. 70-CV-08-20699

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Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

KLAPHAKE, Judge

Appellant Clifford Kurth challenges the district court's grant of summary judgment to his former employer, respondent American Building Contractors, Inc. (ABC), on his counterclaims of reprisal under the Minnesota Human Rights Act (MHRA) and tortious interference with prospective advantage. Respondent sued appellant for breach of contract after appellant began employment with a competitor employer within the geographical range prohibited by a noncompete agreement appellant signed at commencement of his employment with respondent. Because appellant has failed to establish a prima facie case of either reprisal or tortious interference with prospective advantage, we affirm. We also grant respondent's motions to strike portions of appellant's reply brief and appendix, and deny respondent's motion for attorney fees.

D E C I S I O N

On appeal from summary judgment, this court reviews the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). But no genuine issue of material fact exists 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).

As a preliminary matter, appellant claims that the district court granted summary judgment prematurely because he had not completed discovery. We decline to address this issue because it was not raised to the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate court considers only issues raised to district court). We also note that the rules of civil procedure permit a party to move for summary judgment "at any time after the expiration of 20 days from the service of the summons." Minn. R. Civ. P. 56.01. Appellant could have moved for a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had," Minn. R. Civ. P. 56.06, but he did not do so.

1. MHRA Reprisal Claim

Under the MHRA, an employer is prohibited from "intentionally engag[ing] in any reprisal against any person because that person . . . opposed a practice forbidden" by the MHRA. Minn. Stat. § 363A.15 (2008). A prima facie case of reprisal requires "(1) statutorily protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 548 (Minn. 2001) (quotation omitted). Minnesota courts consider a reprisal claim under the *McDonnell-Douglas* burden-shifting analysis, so that once an employee establishes a prima facie case, the burden shifts to the employer to "articulate a legitimate and non-discriminatory reason for the adverse employment action . . . ." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999). If

the employer meets that burden, the burden shifts back to the employee to show that the employer's conduct was pretextual. *Id.* Summary judgment is appropriate if an employee fails to present a prima facie case of employment discrimination under the MHRA. *Benassi v. Back & Neck Pain Clinic Inc.*, 629 N.W.2d 475, 482 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001).

The district court based its grant of summary judgment on appellant's failure to include any evidence of a causal link between respondent's objection to appellant's new employment and appellant's opposition to any practice forbidden by the MHRA while working for respondent. Appellant offers no evidence linking the two actions, and the timeline of events provides circumstantial evidence to the contrary—appellant quit months before respondent took action on the noncompete contract. *Cf. Hubbard v. United Press Int'l Inc.*, 330 N.W.2d 428, 445 (Minn. 1983) (stating "causal connection [requirement] may be demonstrated indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time").

In addition, appellant has not met his burden to offer evidence of adverse employment action that would constitute actionable reprisal under the MHRA. Appellant quit employment with respondent before the alleged reprisal conduct occurred. *See* Minn. Stat. § 363A.15 (defining reprisal to include employer conduct toward an employee during period of employment, unless the employer informs a new employer of the employee's MHRA-related conduct). Because appellant failed to show evidence of a

causal connection between statutorily protected conduct and respondent's action on the noncompete contract, or otherwise show evidence of reprisal, the district court properly granted summary judgment on appellant's MHRA claim

2. Tortious Interference Claim

Appellant also claims that the district court erred in granting summary judgment on his claim of tortious interference with expected economic advantage. The elements of this claim are:

> 1. the existence of a reasonable expectation of economic advantage or benefit belonging to Plaintiff;
>
> 2. that Defendant[] had knowledge of that expectation of economic advantage;
>
> 3. that Defendant[] wrongfully and without justification interfered with Plaintiff's reasonable expectation of economic advantage or benefit;
>
> 4. that in the absence of the wrongful act of Defendant[], it is reasonably probable that Plaintiff would have realized his economic advantage or benefit; and
>
> 5. that Plaintiff sustained damages as a result of this activity.

Harbor Broad. Inc. v. Boundary Waters Broadcasters Inc., 636 N.W.2d 560, 569 n.4 (Minn. App. 2001).[1] Here, the district court ruled that appellant could not establish a prima facie claim because the statements included in respondent's letter to him were true; appellant did not establish an economic advantage that he failed to realize; and appellant did not show that he sustained damages. We agree with this assessment. Appellant had

[1] As respondent notes, it is uncertain whether this is a valid cause of action under Minnesota law. *Id.* ("We decline to decide whether a claim for tortious interference with business expectancy is a valid tort claim under Minnesota law.").

no reasonable expectation of economic advantage by working locally for a competitor because he signed a noncompete agreement with respondent that prohibited such employment, and respondent had no knowledge of any expectation of economic advantage held by appellant because he did not have such an advantage. Further, any "interference" by respondent with appellant's new employment was an attempt to enforce the noncompete agreement; as such, respondent's conduct was not wrongful and was with justification. In addition, appellant has offered no evidence to show any economic advantage or benefit from working for his new employer that he would have realized without "interference" by respondent.

Finally, appellant has not demonstrated that he suffered damages from respondent's enforcement of the noncompete agreement; appellant has not shown that his move to Texas to work for his new employer led to damages—he offers no evidence of pecuniary damages, and respondent provided evidence that appellant was willing to relocate while employed there. While appellant alleges that his attorney fees constitute damages, Minnesota courts are "exceedingly cautious when awarding attorney fees as damages" in tort actions and typically do not authorize such fee shifting without a specific statutory or contractual basis. *Kallok v. Medtronic Inc.*, 573 N.W.2d 356, 363 (Minn. 1998). As noted by the district court, *Kallok* awarded attorney fees as damages only because the employer attempting to enforce a noncompete agreement was a third-party litigant not subject to the general rule prohibiting shifting of attorney fees, and the underlying tort was valid. *Id.* Because appellant cannot establish any of the elements to

demonstrate a prima facie case of tortious interference with expected economic advantage, the district court properly granted summary judgment on this issue.

3. Respondent's Motions to Strike and for Attorney Fees

Finally, respondent moved this court to strike the supplemental appendix to appellant's reply brief and any references to the appendix in the reply brief, to strike appellant's argument on the validity of the noncompete agreement included in his reply brief, and for attorney fees. We grant respondent's motion to strike the supplemental appendix to appellant's reply brief and the references in the brief to the appendix on the ground that the supplemental appendix contains documents that were not presented to or considered by the district court when it granted summary judgment. *See Thiele*, 425 N.W.2d at 582. We further grant respondent's motion to strike the argument in appellant's reply brief that he was never provided with a properly executed copy of the noncompete agreement, because that issue was not addressed in appellant's principal brief. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990), *cert. denied* 498 U.S. 1090 (1991) (prohibiting appellant from raising issues in reply brief that were waived by failure to address them in "appeal brief"). Finally, we deny respondent's motion for $3,686.78 in attorney fees because we generally do not award attorney fees absent authorization by contract or statute, *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983), and respondent did not demonstrate a substantive basis for an award of fees.

Affirmed; motions to strike granted and motion for attorney fees denied.