**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1907**

Pamela M. Spera,
Appellant,

vs.

Kosieradzki Smith Law Firm, LLC,
Respondent.

**Filed July 6, 2010**
**Affirmed**
**Minge, Judge**

Hennepin County District Court
File No. 27-CV-08-23367

William J. Mavity, Red Wing, Minnesota (for appellant)

Charles E. Feuss, Tina Syring-Petrocchi, Ford & Harrison LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Muehlberg, Judge.*

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

**MINGE**, Judge

Appellant attorney challenges the district court's grant of summary judgment dismissing her claim for discriminatory discharge by respondent law firm. Appellant

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

argues that respondent (1) discriminated on the basis of age and gender; (2) defamed her; and (3) breached an implied-in-fact contract. We affirm.

## FACTS

Respondent Kosieradzki Smith Law Firm hired appellant Pamela Spera initially as a contract attorney and then, in October 2004, as an associate. The firm terminated her employment in August 2006. When hired as an associate, Spera was 47 years old, had several years of legal experience, and had a strong resume.

The firm was formed in 2004 and consisted of just two partners (Mark Kosieradzki and Joel Smith), support staff, Spera, and student law clerks. Prior to the organization of the firm, Spera worked for Kosieradzki on a contract basis. At the firm, Spera's yearly salary began at $52,000, increased in 2005 to $75,000, and increased again in 2006 to $85,000.

Between 2004 and 2007, the firm employed six student law clerks—three male and three female. Three were offered positions as associates. Lucas Cragg was a clerk in 2005. He was offered an associate position during his last year in law school in January 2006. Cragg's position was to start in October 2006 and was contingent on his passing the bar examination. Cragg began work as scheduled. James Newman, a clerk in 2006-07, was offered an associate position in February 2007 to begin in the fall of 2007, also contingent on admission to the bar. Newman did not complete the condition and was not hired. Kara Rahimi was a law clerk in 2007 and began working as an associate in 2008.

The summary judgment record clearly indicates that Spera was not comfortable as an associate at the firm. She felt Smith demeaned her by comparing her with Cragg, then

a law student. She felt slighted when the partners gave Cragg, a law student, primary shared responsibility for production of a brief that she had worked on. She also found offensive a reality-show-type contest between herself and Cragg that Smith organized. She claims that the firm admonished her for making objections and not multitasking while attending depositions scheduled by opposing counsel. She was offended by office banter, stating that Smith used vulgar language, told her to dress more appropriately, and spoke disparagingly of other, often female, attorneys. She felt the firm was demanding and failed to recognize personal sacrifices she made for the firm such as truncating planned vacations.

Several differences arose prior to Spera's termination in August 2006. In January 2006, the firm offered her a contract that she rejected because she claims it was overly strict and demeaning. Smith told Kosieradzki that Spera failed to complete work that Spera claims was actually Smith's responsibility. She claims she was criticized for submitting a brief that disclosed precedent adverse to the result the firm was seeking. Two weeks before the firing, Smith stated in a staff meeting that Spera's assigned section of a brief was given to him late and resulted in a rushed filing. Kosieradzki and Smith both expressed strong disapproval of how she argued a motion at a hearing that they attended with co-counsel.

The day after the motion hearing, Smith fired Spera. At the time of the dismissal, Smith told her she was "not a good fit" for the firm, without further elaborating. Co-counsel in the case that was the subject of the motion hearing was in an adjacent room during the firing. After a brief opportunity to clean out her desk, Spera was escorted

from the office. Days later, Kosieradzki stated in an e-mail to Spera that her "performance was not meeting the needs of [the] law firm." Spera was 49 years old at the time she was fired.

Spera sued, claiming, among other things, that (1) she was fired on account of her age and gender in violation of the Minnesota Human Rights Act (MHRA); (2) the partners defamed her by blaming her for a late-filed brief and in the way they conducted her discharge; and (3) the firm breached an implied contract to not inhibit the ethical practice of law. The district court dismissed Spera's lawsuit on summary judgment. This appeal follows.

**D E C I S I O N**

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). An appellate court will reverse a grant of summary judgment if there is a genuine issue of material fact or the district court misapplied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine issue of material fact when the factual record presented by the nonmoving party "is not sufficiently probative with respect to an essential element . . . to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The nonmoving party "must do more than rest on mere averments." *Id.*

**I.**

The first issue raised by Spera is whether the district court erred by dismissing her claims under the MHRA, which provides that employers cannot discharge employees based on age or sex when the discriminatory reason does not relate to a bona fide job qualification. Minn. Stat. § 363A.08, subd. 2(1), (2) (2008). When, as here, there is no direct evidence of discrimination, Minnesota courts apply the *McDonnell Douglas* framework for determining discrimination based on circumstantial evidence. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995) (applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973)). Minnesota courts look to federal cases in applying the *McDonnel Douglas* analysis. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). The framework places the initial burden on the employee to establish a prima facie case of discrimination; it then shifts the burden to the employer to give a nondiscriminatory reason for the firing; after which the employee must prove by a preponderance of the evidence that the given reason is a pretext for discrimination. *Hamblin v. Alliant Techsystems, Inc*., 636 N.W.2d 150, 152-53 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Under this last step the sole question remains whether the factfinder is persuaded the employee is a victim of intentional discrimination. *Doan v. Medtronic, Inc*., 560 N.W.2d 100, 105 (Minn. App. 1997), *review denied* (Minn. May 14, 1997).

*A. Prima Facie Case—Replacement by Nonmember of the Protected Class*

To establish the prima facia case, Spera must show she (1) is a member of a protected class; (2) was qualified for the job; (3) was fired; and (4) was replaced by a

nonmember of the protected class. *Pribil v. Archdiocese of St. Paul and Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995). The district court concluded that Spera met the first three elements under step one but failed on the last. The fourth element requires the demoted or discharged person to show that she was replaced by an individual who was not a member of her protected class or that her position was open and the employer was seeking someone who was not a member of the protected class. *Hindman v. Transkrit Corp.*, 145 F.3d 986, 992 (8th Cir. 1998).

Spera claims that she was replaced by Cragg and that the firm attempted to also replace her with Newman. Cragg started with the firm on an informal basis as a law-student mentee and was hired as a student law clerk in the spring of 2005, a year and a half before Spera's discharge. In January 2006, eight months prior to Spera's discharge, the firm offered Cragg an associate-attorney position contingent upon his graduating from law school and being admitted to the bar. Cragg started work in October 2006, two months after Spera's termination. Newman was offered a job in February 2007, six months after Spera's firing. Newman would have started in the fall of 2007, fourteen months after Spera's firing, but he never met the conditions of the offer and never assumed the associate position. An associate position was subsequently filled by Rahimi, a woman. Rahimi had worked for the firm as a student law clerk in the 2007-08 school year, was offered the associate position in the spring of 2008, and began work as an associate in the fall of 2008.

In reviewing the hiring of associates, it is significant that none of the hiring timeframes match up with Spera's discharge. Cragg was offered a job eight months

before, and there is no material evidence showing that this offer was made with Spera's firing in mind. Although Spera suggests that the firm was unhappy with her, the bulk of the firm's criticisms arose after the offer to Cragg. Moreover, the same month that Cragg received his offer Spera was offered an employment contract that would have afforded her job security. The firm also increased Spera's salary after making the offer to Cragg. These uncontested events are not consistent with a plan to discharge Spera and are inconsistent with her speculation that the firm had an ongoing strategy to fire her.

As for the offer to Newman, we note that it was made six months after Spera's firing. This is too long a period to be presumptively linked to Spera's discharge or the planned assignment of Spera's work to the younger male attorney. Because Newman never actually worked as an associate, the tie is even more attenuated. The offer to Rahimi, a younger female, was after the Newman offer.

Viewing the record most favorably to Spera, we conclude that the evidence supporting the fourth element is too speculative and attenuated to withstand a motion for summary judgment. The district court did not err in determining that the facts favorable to Spera are insufficient to show that she was replaced by a nonmember of her protected class.[1]

[1] We note that Spera could have established that she was replaced by a nonmember of the protected class by demonstrating that her job responsibilities were specifically assigned to some combination of Cragg, Newman, or Rahimi. *Hindman*, 145 F.3d at 992; *see Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (addressing discrimination in employment opportunities, and requiring a showing that opportunities remained available or were given to other persons with plaintiff's qualifications). If it was shown that Spera's day-to-day duties were transferred to the later-hired associates, there would be an indication that the firm intended to replace her with those associates at

*B. Pretext*

Even if Spera did satisfy the fourth prong of step one, she would have to produce evidence to show that the firm's asserted reasons for the firing were pretext. *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 882 (Minn. App. 1988). A plaintiff may sustain the burden to establish pretext "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981). Vague reasons are suspect. *Id*. at 255-56, 101 S. Ct. at 1094-95 (requiring employer to give reason "with sufficient clarity" to allow plaintiff to argue pretext). Although courts will not consider reasons articulated in an answer to a complaint or arguments by counsel once litigation has commenced, it will consider reasons given through submitted and admissible evidence. *Id.* at 255, 101 S. Ct. at 1094 n.9. Therefore, we may consider the reasons explained in depositions and other evidence. We also note that when the same supervisor hires a member of a protected class and then discharges that person, pretext is less likely. *See Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362-63 (8th Cir. 1997) (recognizing strong inference that discriminatory motives are not present if the same person hired and fired the employee).

We agree with Spera that the explanation for her discharge expanded with the passage of time. The firm initially stated that it fired Spera because she was "not a good

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the time it fired Spera. Here, there is no evidence revealing a breakdown of the time Spera spent on various responsibilities, nor is there evidence that the volume and nature of legal work at the firm continuously required Kosieradzki, Smith, and a third attorney with Spera's level of experience and qualifications.

fit." The firm has since explained that she (1) expended too much time on assignments; (2) disregarded the firm's policy on depositions; (3) delayed finishing sections of briefs; (4) underperformed at oral arguments; and (5) complained about her assigned responsibilities. Spera argues that these reasons have shifted, evidencing pretext.[2]

We recognize that a shifting explanation may be a facile cover for discrimination. But here, the not-a-good-fit explanation is not inconsistent with the more specific bases subsequently identified. Therefore, the not-a-good-fit explanation may not be a shifting explanation at all. It is not surprising that employers are reluctant to articulate critical reasons behind firings. Articulating these reasons often generates factual disputes over the accuracy of the characterization and, to the extent the expressed reasons harm the employee's job search, can become the basis for further claims against the employer. *See Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 888 (Minn. 1986) (recognizing that, following separation of employment, employer may be liable for employee's self-defamation to future employers regarding specific reasons for previous termination). The not-a-good-fit explanation may also merely reflect a generalized awkwardness within a professional relationship that defies easy explanation. We lastly find three uncontested facts noteworthy: First, the firm partners now accused of discrimination hired Spera two years previously, when Spera's age and gender were apparent and not an issue; second, eight months prior to Spera's firing, the firm offered

[2] Spera also claims that the firm complained that she was unqualified in its report to the state department of human rights. But the firm only stated that her allegations were caused by "her feeling hurt that her employers felt she was unqualified as an attorney." We find no place in the record where the firm actually asserted that she lacked the necessary qualifications for the job.

her a contract, albeit one she rejected, that provided job protection; and third, during the months preceding her firing, the firm increased her compensation. These facts are starkly inconsistent with the claim that the firm's explanations were pretextual.

Spera also argues she is not responsible for the shortcomings cited by the firm, claiming that the firm blamed her for situations that were not material or were the responsibility of others. But she does not produce evidence that adequately marginalizes the firm's clear displeasure with her oral-argument performance, the time she spent on assignments, and her attitude about collaborating with law clerks. Spera also admits that she took issue with the firm's policies regarding depositions. This provides context for the not-a-good-fit explanation by the firm, not pretext.

Similarly, instructing Spera to forward a legal-analysis section of a brief to Cragg and instances where she was compared to Cragg may be insensitive, but do not reveal gender- or age-based animus and do not discredit the reasons behind her discharge. Spera's representations regarding Smith's vulgar language and offensive comments about other lawyers, including female lawyers, may indicate disappointing conduct. But those allegations too do not translate into gender discrimination when that same attorney hired Spera, participated in offering her job security, and increased her salary.

In sum, we conclude that Spera does not produce adequate evidence to establish pretext. The district court did not err in determining that the record was insufficient to withstand summary judgment. We affirm dismissal of the MHRA claims.

## II.

The second issue is whether the firm defamed Spera. In her amended complaint, Spera alleged[3] that Smith defamed her by blaming her for the late brief during a staff meeting and firing her while co-counsel was in an adjacent room. A plaintiff alleging defamation must prove the defendant (a) made a statement about the plaintiff; (b) that was false; (c) was communicated to a third party without privilege; and (d) harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). False statements concerning a person's professional conduct do not require proof of actual damages. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

The district court found Spera did not allege defamation with particularity. The particularity requirement, however, is not a high burden. The complaint need only allege who made the defamatory statement, to whom the statement was made, and where; the complaint need not recite exact language. *Schibursky v. Int'l Bus. Machines Corp.*, 820 F. Supp. 1169, 1181 (D. Minn. 1993). Smith's purported statement to office employees that Spera was to blame for a late-filed brief identifies the speaker, the place, the audience, and the alleged harmful statement.

Spera's other defamation claim is based on the circumstances of her firing. Spera, however, does not identify any defamatory statement given at that time. Even if she did

[3] Spera mentions other instances of defamation in her depositions and briefs. But allegations of defamation not included in the complaint are not validly asserted. *Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 538 (Minn. App. 1997), *review denied* (Minn. June 11, 1997).

identify a defamatory statement in the complaint, there is no record that co-counsel and staff in an adjacent conference room heard or observed any expressions from the firm regarding Spera. Although the firing and escorting from the building may have been embarrassing, such treatment cannot be actionable without a defamatory statement. *See Bolton v. Dep't of Human Servs.*, 540 N.W.2d 523, 525-26 (Minn. 1995) (concluding that act of escorting out fired employee alone cannot be defamation).

To qualify as defamatory, the statement that Spera was to blame for the delayed filing must also assert or imply the existence of a fact that can be proven true or false. *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 95-96 (Minn. App. 2005). Minnesota courts have looked to four factors to distinguish protected opinion statements from actionable fact statements: (1) specificity; (2) verifiability; (3) social and literary context; and (4) public context. *Hunt v. Univ. of Minn.*, 465 N.W.2d 88, 93 (Minn. App. 1991) (adopting test from *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8th Cir. 1986)). Whether a statement can be proven true or false is a question of law. *Lund v. Chi. & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991), *review denied* (Minn. June 19, 1991).

We apply the *Janklow* factors in turn. First, Spera's allegation regarding the brief does not specify whether Smith was alleging that she missed a deadline or if she took too long on her assigned portion of the brief. Second, it is difficult to verify who was ultimately responsible for the rushed filing. Determining whether an attorney took too long on a brief section is a highly subjective question. Regarding the third and fourth factors, the context of the statement was an internal staff meeting in a small law firm.

The meeting was held to evaluate and improve firm practices. Spera was present to defend her role in the filing. Given these considerations, we conclude that the nature of the statements is unverifiable opinion. *See Gernander v. Winona State Univ.*, 428 N.W.2d 473, 476 (Minn. App. 1988) (concluding that the context showed that statements were opinion where allegedly defamatory letter was sent to small number of individuals within the organization and letter supporting employee accompanied the letter). The district court did not err in dismissing the defamation claim.[4]

**III.**

The third issue is whether the firm breached an implied contract with Spera to not fire her for maintaining a commitment to ethically practice law. Appellant appears to argue, regardless of being an at-will employee, that (a) the firm had an implied obligation to her as an attorney to enable her to practice law in an ethical manner; (b) the firm had a policy of not speaking up when opposing counsel deposed clients or witnesses; (c) this policy was unethical; (d) the firm criticized her for making objections and not multitasking while attending depositions; and (e) disagreement over this policy led to her discharge. She makes a parallel claim about her duties as an attorney and the firm's criticism of her decision to disclose relevant but unfavorable legal precedent in a brief submitted to the district court.

In employment disputes courts presume an at-will contract unless "objective evidence" reveals that the parties intended to limit the employer's authority to fire. *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 182 (Minn. App.

[4] In reaching this conclusion, we do not consider whether the statement was privileged.

2001), *review granted* (Minn. July 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001); *Bakker v. Metro. Pediatric, P.A.*, 355 N.W.2d 330, 331 (Minn. App. 1984). Minnesota courts have declined to recognize an implied covenant of good faith and fair dealing in at-will employment relationships. *Bratton v. Menard, Inc*., 438 N.W.2d 116, 118 (Minn. App. 1989), *review denied* (Minn. June 9, 1989). As an alternative, Minnesota has protected at-will employees from wrongful discharge by recognizing a tort claim under the public-policy exception to at-will employment. *Id*.; *Phipps v. Clark Oil & Refining Corp*., 408 N.W.2d 569, 571 (Minn. 1987) (discussing purposes of public-policy exception to at-will employment); *see also* Minn. Stat. § 181.932, subd. 1(3) (2008) (barring adverse action against employees based on refusal to violate state laws or rules adopted pursuant to law).

Spera's implied-contract claim is not grounded in Minnesota law. She offers no objective evidence of anything other than an at-will relationship. She does not argue that her firing constituted a wrongful-discharge tort cause of action, nor has she pointed to a special implied-contract cause of action for attorneys or professionals generally. Under these circumstances, we decline to sua sponte undertake a wrongful-discharge analysis of Spera's firing or graft the wrongful-discharge tort onto her implied-contract claim.

Even if Spera could show an implied-contract or wrongful-discharge standard inhibiting a firing based on her refusal to follow the firm's deposition policy, her differences with the firm appear to be largely a debate over lawyering tactics. It is not surprising that an argument between a partner and associate in a small law firm over

differences in tactics and strategies can lead to a strained relationship. The district court did not err in dismissing Spera's contract claim.

**Affirmed.**

Dated: