STATE OF MINNESOTA
IN COURT OF APPEALS
A10-633

Darrel Schmitz,
Appellant,

vs.

United States Steel Corporation,
Respondent.

Filed December 7, 2010
Affirmed in part, reversed in part, and remanded
Collins, Judge[*]

St. Louis County District Court
File No. 69DU-CV-08-3442

Phillip M. Kitzer, Clayton D. Halunen, Frances E. Baillon, Halunen & Associates, Minneapolis, Minnesota (for appellant)

Marilyn J. Clark, Dorsey & Whitney, Minneapolis, Minnesota; and

Rodney M. Torbic (pro hac vice), US Steel Corporation, Pittsburgh, Pennsylvania (for respondent)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Collins, Judge.

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

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

COLLINS, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent, arguing that there are genuine issues of material fact precluding summary judgment on his claims of retaliatory discharge and failure to offer continued employment under the workers' compensation statute and on his claims of disability discrimination and failure to make reasonable accommodation under the Minnesota Human Rights Act (MHRA). Because the record evidence is insufficient as a matter of law to create a genuine issue of material fact as to whether appellant is disabled, we affirm the district court's grant of summary judgment with respect to appellant's claims under the MHRA. But because there are genuine issues of material fact as to whether appellant was discharged in retaliation for seeking workers' compensation benefits and whether respondent had employment available within appellant's physical limitations, we reverse the district court's grant of summary judgment with respect to appellant's claims under the workers' compensation statute and remand for the resumption of proceedings.

FACTS

Prior to this litigation, respondent United States Steel Corporation employed appellant Darrel Schmitz at its iron-ore mine in Keewatin as a maintenance mechanic, a physically demanding position. Appellant has a history of lower-back problems, including reported work injuries in 1992, 1996, 1997, and 1998, as well as a number of other physical ailments. For instance, appellant underwent shoulder-replacement surgery on his right shoulder in 2000; injured his right knee at work in September 2005 and

subsequently underwent arthroscopic surgery, which successfully resolved all symptoms; and suffered a stroke in April 2006, resulting in left-side weakness in his body, but no paralysis or "significant muscular weakness."

Appellant returned to work in May following his stroke. On October 23, 2006, appellant injured his lower back at work. According to appellant, a couple of days later, Larry Sutherland, who was then a manager at the Keewatin facility, called appellant at home and told him that he likely would be fired if he filled out an accident report. Appellant returned to work a few days after October 23 and did not file an accident report at that time.

Appellant worked, apparently capably and without incident, until December 28, 2006, when he injured his lower back while putting meat in his freezer at home. Appellant attempted to return to work on January 2, 2007, but he was in pain and physically unable to work. On January 4, appellant filed a claim for sickness and accident benefits, which he received for one year. He underwent back surgery in August. In November, appellant was medically cleared to return to work with lifting restrictions, and he informed respondent of his desire to do so.

Appellant filed a claim for workers' compensation benefits in April 2007. In July 2008, a workers' compensation judge issued a decision denying appellant's claim, concluding that appellant was not entitled to benefits because he had failed to provide sufficient notice to respondent and, alternatively, because his October back injury had fully resolved before he sustained the unrelated back injury while at home in December.

After respondent did not return him to work, appellant brought a civil action pursuant to Minn. Stat. § 176.82 (2008), claiming retaliatory discharge and failure to offer continued employment, and Minn. Stat. § 363A.08 (2008), claiming disability discrimination and failure to make reasonable accommodation. Respondent moved for summary judgment, which the district court granted. This appeal followed.

D E C I S I O N

Summary judgment is appropriate when all the evidence in the record "show[s] that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03 (2008). We review de novo whether the district court erred in its application of the law and whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists when the record contains evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Courts "must not make factual findings or credibility determinations or otherwise weigh evidence relevant to disputed facts." *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010).

I.

Appellant alleges that he is a qualified disabled person and that respondent engaged in unfair employment practices in violation of Minn. Stat. § 363A.08, subd. 6(a), by failing to make reasonable accommodation to his known disability, and in violation of

Minn. Stat. § 363A.08, subd. 2, by discharging him or otherwise discriminating against him because of his disability. Both claims require appellant to prove that he is a disabled person, which the MHRA defines as "any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Minn. Stat. § 363A.03, subd. 12 (2008).

When provisions of federal anti-discrimination statutes are similar to provisions of the MHRA, interpretations of those federal statutory provisions are "useful to guide our interpretation of the MHRA." *Kolton v. Cnty. of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002). The MHRA is similar to the Americans with Disabilities Act (ADA); the only relevant difference is that the ADA employs a "substantially limits [one or more major life activities]" standard, which is more stringent than the MHRA's "materially limits" standard. *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). An ADA plaintiff must clear the "significant hurdle" of establishing disability, and "does not prove that he or she has a disability simply by showing an impairment that makes it impossible to do his or her particular job without accommodation." *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 842 (8th Cir. 2005).

The Eighth Circuit has held that working is a major life activity under the ADA. *Id.* at 844. The relevant question is whether the individual's physical limitation "forecloses the broad category of jobs for which [his] background and skills otherwise would fit him." *Id.* at 848. "Ability to do another job of the same general class is inconsistent with a substantial limitation on the major life activity of working." *Id.*

Under the MHRA, courts consider the number and type of jobs from which the impaired individual is disqualified, the geographic area to which the person has reasonable access, the person's job expectations and training, and the relevant employment criteria or qualifications associated with different types of jobs. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 (Minn. 2001).

Appellant has not produced sufficient evidence to create a triable fact question as to whether he is materially limited in the major life activity of working. The evidence is sufficient to show that appellant cannot work at a job requiring heavy or constant lifting or requiring climbing high ladders or scaffolding. But by his own testimony, appellant could work at a desk job, could likely be a truck driver, and could perform the responsibilities of a foreman assistant. We note that the record contains evidence of appellant's previous employment in other occupations. After high school, appellant served honorably as a United States Marine and subsequently attended two years of technical school in electrical maintenance and a year and a half of junior college. Appellant has previously worked as a teacher's aide and as a gas-station manager. Essentially, appellant's argument is that he cannot perform only the responsibilities of a maintenance mechanic, which is insufficient to withstand summary judgment.

A lifting restriction may be relevant to establishing disability, but even a permanent medical restriction on lifting "will not be enough to establish disability" under the ADA. *Nuzum*, 432 F.3d at 844-45. Lifting is merely "part of a set of basic motor functions that together represent a major life activity," and the question is whether there is a "substantial limitation of a constellation of . . . basic motor functions." *Id.* at 845.

Thus, "a limitation on lifting together with limitations on other basic motor functions may create a triable issue of disability if in the aggregate they prevent or severely restrict the plaintiff from doing the set of manual tasks that are of central importance to most people's daily lives." *Id.* at 847 (quotation omitted).

Appellant testified in his deposition that, following his shoulder surgery, he "basically turned from right-handed to left-handed," conducting most activities with his left hand. He remains able to drive, but he drives predominantly with his left hand because it hurts when he uses his right hand. He is able to drive his lawnmower and mow his lawn. He cannot lift objects with his right hand while extending his arm and holding them far away from his body. He can lift lightweight objects such as soup cans, and he could lift a gallon of milk or a pitcher of water if he held it close to his body.

Appellant also testified that, following his April 2006 stroke, the left side of his body feels numb; he struggles to grab and hold onto things without letting go, and he must concentrate to do so; and his "balance is off," affecting his ability to walk up and down stairs (he must do so carefully) and climb ladders (he will climb a few rungs but not "high ladders").

Regarding his back injury, appellant's deposition testimony is that he cannot do any heavy lifting and he struggles to climb ladders. Appellant is restricted from lifting more than 20 pounds and from lifting or carrying more than 10 pounds repetitively. Appellant testified that he could not shovel snow, drag firewood, or pull heavy objects, but that, with some pain, he could drag or pull lighter objects. Appellant takes prescription painkillers, which help enable him to do these things, but "[i]t's not great."

His regular activities include driving to visit his father or to pick up groceries, fishing from a boat, and mowing his lawn.

Appellant has failed to produce sufficient evidence on the question of lifting as part of a constellation of basic motor functions to show, on that basis, a disability under the MHRA. Although appellant confronts physical limitations, he continues to mow his lawn, drive, go grocery shopping, fish, and hunt. These are normal day-to-day activities, and the evidence shows that appellant's continuing lifestyle is largely consistent with how he lived before he claims he was disabled.

Sleeping may also constitute a major life activity. *Nuzum*, 432 F.3d at 846. But merely experiencing some difficulty sleeping is not enough to establish disability. *See Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001) (holding that a person unable to sleep more than 5 hours per night was not substantially limited in the major life activity of sleeping); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999) (holding that plaintiff failed to establish she was substantially limited in the major life activity of sleeping when she failed to present evidence "that her sleep problems were severe, long term, or had a permanent impact").

In his deposition, appellant testified that, since he underwent shoulder-replacement surgery on his right shoulder, he "can't sleep on it." He does not appear to have ever claimed to be unable to sleep—just that he cannot sleep in one particular position. As a matter of law, appellant has not produced evidence of a material limitation on his ability to sleep.

Appellant has not produced sufficient evidence to create a triable fact question as to whether he is materially limited in the major life activity of working, lifting as part of a constellation of basic motor functions essential to everyday life, or sleeping. We also find no record evidence sufficient to show that appellant has had or is regarded as having any materially limiting impairment. Thus, we conclude that the district court did not err in determining that appellant is not disabled under the MHRA, and that appellant therefore cannot prove an MHRA claim.

II.

A. Retaliatory Discharge

Under Minnesota's workers' compensation statute, an employer who "discharge[es] or threaten[s] to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstruct[s] an employee seeking workers' compensation benefits is liable in a civil action." Minn. Stat. § 176.82, subd. 1. Claims alleging discharge in retaliation for seeking workers' compensation benefits are reviewed under the *McDonnell Douglas* burden-shifting test. *Snesrud v. Instant Web, Inc.*, 484 N.W.2d 423, 427-28 (Minn. App. 1992) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)), *review denied* (Minn. June 17, 1992).

Under this three-part test, the employee must first establish a prima facie case of retaliatory discharge. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 119 n.7 (Minn. 1991). If the employee has made out a prima facie case, the employer must articulate a legitimate reason for the discharge. *Id.* The burden then shifts back to the employee to show that the stated reason is actually a pretext for discrimination.

Sigurdson v. Isanti Cnty., 386 N.W.2d 715, 720 (Minn. 1986). In a mixed-motives case, the question on the third step of the *McDonnell Douglas* analysis is "whether retaliation was a discernible, discriminatory, and causative factor in the discharge." *Graham*, 472 N.W.2d at 119 n.7 (quotation omitted).

"In order to establish a prima facie case where an alleged retaliatory discharge is involved, an employee must establish: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). The causal-connection requirement may be satisfied "by evidence of circumstances that justify an inference of retaliatory motive, such as showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." *Id.* at 445.

Respondent contends that appellant was not discharged but merely remained on a leave of absence due to his work restrictions. David Aagenes, respondent's personnel manager with responsibility for the Keewatin facility as well as another facility in Mountain Iron,[1] testified in his deposition that appellant was not discharged and remained an employee because he had "recall rights," meaning that if appellant became able to return to work within five years, he had the right to regain his position. But appellant's wages, insurance, sickness and accident benefits, further accrual of his pension, credit for continuous service, and leave time all had been terminated, and he sought to return to

[1] Aagenes was the personnel manager during the time appellant was injured and sought to return to work. He retired in February 2009.

work but was not permitted to do so. We conclude that a factfinder could reasonably determine that appellant was discharged. *See* Minn. Stat. § 268.095, subd. 5(a) (2008) (defining "discharge" for unemployment-benefits purposes as occurring "when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer").

According to appellant, a couple of days after his October back injury, Sutherland called appellant at home and told him that he would likely be fired if he filed an accident report. Michael Bakk, appellant's supervisor, was in the room with Sutherland when this conversation took place.[2] Appellant's version of events is further supported by an affidavit of Rory Aimonetti, a union grievance person, asserting that he asked Bakk about this conversation and that Bakk replied "I might just get amnesia" when asked what he would say in the event of a lawsuit. Bakk denies that Sutherland made the alleged statement, but determining which witness is telling the truth requires a credibility determination that cannot be made on summary judgment.

Aagenes explained in his deposition that Susan Wiirre was the on-site personnel representative in Keewatin; she was a staff supervisor who reported to the labor relations department manager, and she was involved with personnel issues such as disability management, workers' compensation, and sickness and accident claims. Aagenes testified that respondent generally restricts accommodation considerations to an employee's incumbent position because of the basic labor agreement with the union; the

[2] At the time, Sutherland was Bakk's supervisor. Sutherland was later promoted and transferred to one of respondent's other facilities.

union and the company would have to agree to move a person out of seniority, which rarely happens.

Aagenes also testified that respondent is self-insured, both for sickness and accident benefits and for workers' compensation, and that he was therefore encouraged to keep costs down. Aagenes testified that, in considering a request for accommodation, the two primary considerations are the person's medical restrictions, including the duration of those restrictions, and the terms of the collective bargaining agreement. Wiirre and Bakk informed Aagenes that appellant was unable to perform the normal functions of his job in November 2007 and thereafter, and Aagenes relied on their opinions.

Appellant alleges that Aagenes asked respondent's physician, Dr. Brian Pfeifer, to modify appellant's lifting restriction to 20 pounds after Dr. Pfeifer cleared appellant to lift 50 pounds. Aagenes admitted that appellant could have resumed working, with accommodation, if his lifting restriction were 50 pounds. Aagenes stated that he "might have" asked Dr. Pfeifer to reconsider his opinion, explaining that he questioned the accuracy of a 50-pound restriction when appellant's own treating physician had consistently imposed a 20-pound restriction. In fact, the report in question by Dr. Pfeifer appears to indicate that appellant's condition was unchanged and that appellant was the one who had indicated that he felt he could lift 50 pounds.

Appellant was assigned to work with a qualified rehabilitation consultant (QRC) with the Minnesota Department of Labor and Industry in his attempt to return to work. Aagenes stated that he was aware that respondent was required to engage in an interactive process with appellant. *See Breiland v. Advance Circuits, Inc.*, 976 F. Supp. 858, 864 (D.

Minn. 1997) (observing that obstructing or delaying the interactive process, including failing to communicate, is evidence of bad faith). But Aagenes did not return the QRC's telephone calls because appellant's workers' compensation case was in litigation at that time. When asked whether he engaged in an interactive process with appellant's QRC, Aagenes replied:

> Well, at this point, this was a QRC that was brought in, apparently by [appellant's] attorney . . . during the time of a litigated dispute on workers' comp capabilities. And we were disputing the workers' comp, so it's very likely that with the advice of our counsel on workers' comp matters that we not engage in any rehab plan regarding workers' comp. That does not mean that we weren't otherwise available or interested in returning [appellant] to work. This is separate.

When asked what steps were taken involving an interactive process, Aagenes cited Dr. Pfeifer's periodic review of appellant's condition. Aagenes also testified that he had spoken with Rudy Aho, a union representative, about a company/union agreement to place appellant out of seniority, and that Aho had indicated that the union was not amenable to that. Aho denied this conversation in an affidavit that also indicates that he lacked the authority to move anyone out of seniority.

Appellant's job as a maintenance mechanic was physically demanding employment, although the extent of the physical demands is disputed. According to an affidavit from Bakk, appellant worked on a crew of five maintenance mechanics and one utility technician that was responsible for replacing liners in fifteen grinding mills (rotating equipment that is 27 feet in diameter and grinds rock). This work places demands on maintenance mechanics' strength and dexterity. According to Bakk,

appellant's restrictions rendered him unable to perform the essential functions of a maintenance mechanic. Although maintenance mechanics perform isolated functions on a forklift or with other machines, they spend significant portions of each day "bending to lift, push, or pull items weighing over 20 pounds." Bakk explained that this position "requires frequent heavy lifting of well over 20 pounds" and using "heavy tools above the shoulder level" in close or confined spaces. Respondent's argument here is essentially that appellant was simply unable to do his job, which is why he was not returned to work. This may be true, but reaching that conclusion would require weighing evidence and making factual findings, which is improper on summary judgment.

Appellant has not raised a claim that Sutherland's threat, by itself, constitutes a per se violation of the workers' compensation laws resulting in respondent's liability. *See* Minn. Stat. § 176.82, subd. 1 (providing that an employer who "discharge[es] *or threaten[s] to discharge* an employee for seeking workers' compensation benefits *or in any manner intentionally obstruct[s]* an employee seeking workers' compensation benefits is liable in a civil action" (emphases added)). Appellant does argue, however, that Sutherland's alleged threat is evidence of retaliation that, in conjunction with the other evidence in the record, could lead a rational fact-finder to conclude that he was discharged in retaliation for seeking workers' compensation benefits. We agree.

After injuring his back in October 2006, appellant returned to work and performed light-duty work without incident. After injuring his back again in December, appellant attempted to return to work on January 2, 2007, where he discovered that he was not physically capable. Appellant applied for workers' compensation benefits in April. After

undergoing back surgery, appellant sought to return to work in November in accordance with his physician's restrictions, but respondent never authorized his return. That is, respondent was willing to allow appellant to return on light duty after his initial back injury, but not after he filed a claim for workers' compensation benefits after his second injury.

Between respondent's self-insurance and incentive to keep costs down, Sutherland's threat, respondent's willingness to allow appellant to return on light duty after his initial back injury but not after he sought workers' compensation benefits after his second injury, and respondent's refusal to work with appellant's QRC to return him to work, a reasonable fact-finder could infer that appellant's decision to seek workers' compensation benefits was a causative factor in respondent's decision not to authorize his return to work. We conclude that there is a genuine issue of material fact of whether appellant was discharged by respondent for seeking workers' compensation benefits.

B. Refusal to Offer Continued Employment

An employer is liable in a civil action for its refusal, without reasonable cause, "to offer continued employment to its employee when employment is available within the employee's physical limitations." Minn. Stat. § 176.82, subd. 2. "In determining the availability of employment, the continuance in business of the employer shall be considered and written rules promulgated by the employer with respect to seniority or the provisions or any collective bargaining agreement shall govern." *Id.*

As an initial matter, respondent argues that this claim fails under res judicata principles because the workers' compensation judge denied appellant's claim for

benefits. We disagree. The workers' compensation judge concluded that appellant was not entitled to workers' compensation benefits because (1) appellant failed to provide notice to respondent of his intent to seek benefits and (2) the December injury was not a reinjury of his October back injury. By statute, appellant's claim for respondent's refusal to offer continued employment that was available within his physical limitations is expressly triable by civil action; the claim cannot be precluded by the agency adjudication of his claim for workers' compensation benefits. Similarly, the issues of whether respondent wrongfully denied appellant continued employment and whether appellant was entitled to benefits for his injury are distinct, and therefore appellant is not precluded from litigating this issue.

Respondent argues, and there is some evidence, that appellant could not perform the essential functions of his job. For example, Bakk's affidavit states that maintenance mechanics are members of six-person teams that change 1,550-pound cast steel wear liners. According to Bakk, maintenance mechanics are often "required to work on conveyor belts, pipe lines, magnetic separators, and motors without assistance if circumstances demand action for maintenance," which requires regular lifting of tools, parts, and machinery weighing well over 20 pounds. By contrast, Aimonetti's affidavit states that a maintenance mechanic could perform all essential job functions with a 20-pound lifting restriction because strenuous lifting is "very limited" and can be performed by a team member or with the assistance of equipment designed for that purpose.

Appellant testified in his deposition that "[t]hey gave [him] easy jobs" and that he was on light-duty restrictions when he returned to work after his October 2006 back

injury. According to appellant, when he was ready to return to work with restrictions in November 2007, Bakk told appellant, "No problem, there's lots of work to be done out here." But Aagenes testified that permanent work restrictions present a "difficult case" for respondent because they put a strain on the business and that permanent light-duty positions do not exist.

Appellant also argues that employment was available outside his seniority. Aimonetti's affidavit indicates that the union would have agreed to move appellant to a position outside his seniority and within his work restrictions, such as "painting, fork lift operator, equipment operator, light clean up, tool room attendant, safety inspection/maintenance, filter changer/cleaner, hosing/washing, truck driver, as well as a number of other positions that existed within the plant." These are specific jobs that were apparently available and within appellant's physical limitations.

Aagenes claims that he spoke with Aho about moving appellant out of seniority to a different, available position, and that Aho refused. Aho contends that this conversation did not occur and that he was not authorized by the union to make that decision. In the light most favorable to appellant, respondent is shown to have been unwilling to move appellant out of seniority. Coupled with the evidence that respondent refused to participate in an interactive process to return appellant to work, this could raise an inference that respondent refused to place appellant in employment outside his seniority that was available within his physical limitations. Respondent does not cite and we do not find in the record any evidence of extra-seniority employment not being available—

all of respondent's arguments and evidence pertain to appellant not being able to do everything required of a maintenance mechanic.

We find sufficient evidence in the record to create a genuine issue of material fact regarding whether respondent without good cause refused to offer continued employment to appellant that was available within his physical limitations. It is possible that placing appellant in a different position or offering accommodations allowing him to remain a maintenance mechanic would have imposed an undue hardship on the operation of respondent's business, but that determination would require factual findings improper on summary judgment. We therefore reverse the summary judgment on appellant's claims under the workers' compensation statute and remand for the resumption of proceedings.

Affirmed in part, reversed in part, and remanded.