STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1437

Joni Quam,
Appellant,

vs.

St. Francis Health Services of Morris, et al.,
Respondents.

Filed June 9, 2014
Affirmed
Peterson, Judge

Dakota County District Court
File No. 19HA-CV-12-3235

Robert David Boedigheimer, Boedigheimer Law Firm, P.A., St. Paul, Minnesota (for appellant)

Laura J. McKnight, Bassford Remele, Minneapolis, Minnesota (for respondents)

Considered and decided by Smith, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

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

PETERSON, Judge

Appellant challenges the district court's grant of summary judgment, arguing that there are genuine issues of material fact. We affirm.

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

FACTS

Appellant Joni Quam worked as the director of food services at respondent St. Francis Health Services of Morris, d/b/a/ Trinity Care Center (Trinity), a nursing home and care center. In April 2009, while preparing for an inspection by the Minnesota Department of Health (MDH), Quam discovered mold in Trinity's dish room and kitchen. Quam notified her supervisors, including administrator Richard Ludwig, and those areas were cleaned. Trinity passed the inspection.

For the rest of 2009, Quam had problems with her work environment. Between April and August, Quam began experiencing allergy symptoms, which she reported to Ludwig in July or August. Quam believed that her symptoms and those of coworkers were caused by mold. Trinity provided HEPA masks, installed an air-filtering device in Quam's office, and finally relocated Quam's office to an area away from the kitchen. Quam was embarrassed when other employees ridiculed her for wearing the HEPA mask.

In August, someone other than Quam made an anonymous report about mold issues at Trinity to the Occupational Safety and Health Administration (OSHA). Trinity hired an independent investigator and attempted to eradicate the mold, but it continued to return. Trinity instructed Quam not to publicly attribute her allergies to mold.

In September, Quam had blood tests to determine if there was mold in her body. The results of these tests, which Quam received in October, were negative, but Quam did not reveal the results to Trinity. Also in September, Quam paid $2,500 out of her own pocket to hire a private inspector. Quam did not tell Trinity that she had hired an inspector, but she told one other employee that "a gentleman would be coming to Trinity

and taking a look around." The inspector, Michael Pugliese, arrived in the evening; Quam met him at a door at Trinity's loading dock and showed him around. Quam was the only person present during the inspection. Quam did not tell anyone at Trinity that she had hired an outside expert, and no one on Trinity's supervisory staff or safety committee was aware of the inspection. Pugliese sent Quam a report that described mold growth and water intrusion; he advised that the care center needed professional mold remediation. Quam did not give Trinity a copy of the report.

On October 1, Quam took a 12-week Family and Medical Leave Act (FMLA) leave to alleviate her symptoms. On November 16, Quam called MDH to report the mold issues at Trinity; MDH advised her to make a report to OSHA, which she did. On November 19, MDH made an unannounced inspection of Trinity and issued a report on December 15, which listed multiple state and federal violations of nursing-home standards. Trinity was ordered to take corrective action within 30 days.

On December 4, Quam's doctor released her to return to work, "with the limitation that she was to avoid exposure to high levels of mold unless it is cleaned up." On December 16, a second doctor authorized Quam's return to work, but stated that she was to avoid exposure to mold. Ludwig wrote a letter to Quam advising her that Trinity could not accommodate the mold restriction, but that testing would be conducted on December 16. He further advised Quam that her FMLA leave expired on December 23, 2009, and Trinity anticipated her return to work on December 24. Quam wrote to Ludwig and said that she would not return on December 24, because of "Trinity's inability to assure a clean and safe work environment."

On January 8, 2010, Quam received a letter from Ludwig advising her that the testing disclosed no unsafe levels of mold and that remediation of the areas where mold was discovered had occurred. Ludwig advised Quam that her FMLA leave had expired and they were "look[ing] forward to [her] return to work one day after receipt of this letter." He also stated that any further absence from work would be considered to be unapproved and would be handled "according to company policy." On the same date, Quam applied for unemployment benefits.

On Monday, January 11, 2010, Quam emailed Ludwig and stated that "[a]ny matters regarding [her] employment with Trinity . . . are to be addressed through [her] legal representation as listed below." Quam did not appear for work on January 11 or 12. Trinity's employee handbook defined "abandonment of position" as an employee's "failure to report to work for two (2) days, without notifying his/her Supervisor," and a clause in the handbook permitted Trinity to remove from the payroll an employee who abandoned a position. Trinity terminated Quam's employment on January 13. Quam does not dispute that she never directly told Trinity that she was planning to return to work.

After her employment was terminated, Quam sued Trinity, alleging wrongful termination based on statutorily protected conduct, negligent supervision and retention of Ludwig, and intentional infliction of emotional distress.

Quam alleged that Ludwig, her supervisor, targeted her for dismissal because she had rejected his advances; Quam testified in her deposition that Ludwig invited her on a few dates, which she declined, and drove by her house on one occasion. The district

court did not address these allegations, but noted that Quam "does not allege that she incurred any physical injuries, or that she was threatened with physical injury." Concluding as a matter of law that Quam could not prevail on her wrongful-termination claim or her claim of negligent supervision and retention, and that Quam's claim of emotional distress was not supported by anything more than "mere averments," the district court granted summary judgment. This appeal followed.

D E C I S I O N

I.

We review the district court's grant of summary judgment de novo, to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Eng'g & Constr. Innovs., Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013). "[W]e view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* (quotation omitted). "A genuine issue of material fact must be established by substantial evidence." *Id.* (quotation omitted). "[I]n order to establish that there is a disputed material fact, the party against whom summary judgment was granted must present specific admissible facts showing a material fact issue." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). "[T]here is no genuine issue of material fact 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 that party's case to permit reasonable persons to draw different conclusions." *Driscoll v. Standard Hardware, Inc.*,

785 N.W.2d 805, 810 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Sept. 29, 2010).

II.

Quam alleges that she suffered an adverse employment action because she made a good-faith report of violations of state and federal law, a so-called "whistleblower claim." Under Minn. Stat. § 181.932, subd. 1 (2012):

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) the employee, or a person acting on behalf of an 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 or law enforcement official; . . . [or]
>
> (4) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm.

"To establish liability under the whistleblower act, an employee must prove three elements: [1] statutorily protected conduct by the employee, [2] an adverse employment action by the employer, and [3] a causal connection between the two." *Coursolle v. EMC Ins. Group, Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Apr. 19, 2011).

A whistleblower claim is analyzed using the *McDonnell-Douglas* burden-shifting test. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). Under this test, the plaintiff must establish a prima facie whistleblower case;

next, the employer is permitted to set forth a legitimate, non-retaliatory reason for its actions; and finally, the plaintiff may show that the employer's reason is pretextual. *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007). The district court concluded that Quam failed to present a prima facie case, because, as a matter of law, she did not suffer an adverse employment consequence.

"To satisfy the adverse employment action element, the employee must establish the employer's conduct resulted in a material change in the terms or conditions of her employment." *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841-42 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 7, 2007). The district court determined that Trinity told Quam in its January 8, 2010 letter that there were no unsafe or high levels of mold and that "remediation of the minimal areas containing visible mold has occurred." The letter further informed Quam that her FMLA leave had expired and that "[w]e look forward to your return to work one day after receipt of this letter." Quam never told Trinity that she intended to return, and she instructed Trinity to refer all employment questions to her attorney. After two days of unexplained absences, Trinity terminated Quam's employment in accordance with the rules set forth in its employee handbook. Quam had already applied for unemployment benefits before her employment was terminated. The district court concluded that "no reasonable person could conclude that [Quam] did not abandon her employment or that Trinity fired [Quam]" and that Quam's employment termination was not a product of her reports to MDH and OSHA. We agree.

Quam had the burden of setting out a prima facie case of a whistleblower violation at the summary-judgment hearing, including that she experienced an adverse employment action. Her bare assertion that she did not intend to quit is not sufficient to establish that essential element. *Eng'g & Constr. Innovs.*, 825 N.W.2d at 704. The district court did not err by granting Trinity summary judgment on Quam's whistleblower claim.

III.

Quam argues that the district court erred by granting summary judgment on her negligent-supervision-and-retention claim. An employer has a "duty to control employees and prevent them from intentionally or negligently inflicting personal injury." *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. App. 2007). Minnesota courts have concluded that either physical injury or the threat of physical injury is an essential element of the tort of negligent supervision. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 533-34 (Minn. 1992); *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. App. 1996). The tort of negligent retention arises when an employer has notice that an employee poses a threat of injurious conduct and fails to take steps to protect third parties. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423-24 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993).

Quam does not allege a physical injury, except to say that she "suffered health issues as a result of [Trinity's] supervision of its employees and facility." The district court concluded that her claim failed because she was not physically injured or threatened with physical injury. Because Quam failed to provide sufficient evidence of an injury or

a threat of injury, the district court did not err by granting summary judgment on this claim.

IV.

Quam also asserts that the district court erred by granting summary judgment on her claim of intentional infliction of emotional distress. This tort has four elements: (1) extreme and outrageous tortious conduct; (2) the tortfeasor must act intentionally or recklessly; (3) the conduct must cause the injured party emotional distress; and (4) the distress must be severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). The supreme court has described "extreme and outrageous" behavior as "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (quotation omitted). The complainant has a "heavy burden of production" and "the limited scope of this cause of action . . . reflects a strong policy to prevent fictitious and speculative claims." *Id.*

Quam cites four acts to support her claim: (1) Trinity "deliberately and intentionally" tried to prevent her from reporting the mold issues to anyone outside of the care center; (2) Trinity ignored her reports of mold, causing her health to suffer; (3) other employees ridiculed Quam when she wore the HEPA mask; and (4) Ludwig made unspecified comments to her that she felt were extreme and outrageous.

In *Langeslag v. KYMN INC*, 664 N.W.2d 860, 866-67 (Minn. 2003), the supreme court concluded that making false police reports, threatening to take legal action, and loud and profane workplace arguments did not rise to the level of outrageous conduct. In *Leiendecker*, the supreme court concluded that "conclusory allegations that [the injured

parties] suffered severe emotional distress are not sufficient to satisfy their heavy burden to withstand a motion to dismiss." 834 N.W.2d at 754. As a matter of law, Quam's conclusory allegations do not describe the extreme and outrageous conduct necessary to establish a prima facie case of intentional infliction of emotional distress. Therefore, the district court did not err by granting Trinity summary judgment on this cause of action.

Affirmed.