STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1994

John J. Clemons,
Appellant,

vs.

MRCI WorkSource,
Respondent.

Filed May 27, 2014
Affirmed
Rodenberg, Judge

Carver County District Court
File No. 10-CV-13-666

James T. Smith, Huffman Usem Crawford & Greenberg, P.A., Minneapolis, Minnesota (for appellant)

Julia C. Ketcham Corbett, Blethen Gage & Krause, PLLP, Mankato, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

On appeal, appellant argues that the district court erred in dismissing his complaint and abused its discretion in denying his motion to amend his complaint. We affirm.

FACTS

Appellant John J. Clemons was hired on January 23, 2012 as a driver for respondent MRCI WorkSource, a company providing employment and day services to disadvantaged and disabled individuals. At his first performance review on May 22, 2012, appellant was given a "solid performance" rating, but the review noted that appellant "tends to talk about issues with his coworkers that may cause unnecessary heightened concerns." At another time, appellant was also described "as causing his coworkers to be intimidated and fearful." On September 7, 2012, appellant received a written notice of corrective action for violating a company policy by "socializing with a client without prior company approval." Appellant hired an attorney and "formally responded" to his performance review and the written notice. He alleges that respondent "refused to acknowledge the falsity of the facts [it] relied on in deciding to issue" them.

During his tenure at MRCI, appellant repeatedly informed respondent of his belief that it was violating federal and state law by (1) "failing to conduct pre-trip and post-trip inspections," (2) "requiring drivers to sign pre-trip and post-trip inspection reports that were filled out [by the] MRCI Transportation Director . . . and not the actual drivers," (3) failing to provide proper vehicle access to disabled clients, (4) forcing disabled clients who needed assistance to stand on buses, (5) "failing to properly protect sensitive medical records contained in note books," and (6) "allowing buses to operate despite known safety concerns." Appellant also claimed that MRCI staff "routinely" subjected him to "ridicule and harassment." In a letter dated October 15, 2012, respondent advised

appellant that his "perception of his duties [is] confused with the duties of his supervisor."

Respondent discharged appellant on November 20, 2012 after he "left an MRCI client unattended on his bus." When he was told of this, appellant claimed to have had no memory of leaving the client unattended. He "went to the front desk of the [facility where a meeting was being held] and told the receptionists that they should call 911 because he may be having a stroke." He then "began to break down and cry." 911 was not called. Rather, a representative for respondent brought appellant to the training meeting. There, appellant interrupted the speaker to say that he thought he might have had a stroke and that "someone should call 911."

Appellant was eventually taken to the hospital, was seen, and was discharged the same day. His wife drove him back to work to deliver a doctor's note that stated that appellant could return to work but that "he should not drive any motor vehicle until December 3, 2012." Sometime following appellant's discharge, he was diagnosed with depression and anxiety.[1] Appellant claims that his depression and anxiety existed at the time of his discharge.

According to appellant, respondent's "staff handbook states that even if a current employee's disability is deemed to pose a direct threat to the health or safety of others, such person 'will be placed on appropriate leave until an organizational decision has been made in regard to the employee's immediate employment situation.'"

[1] This fact was first alleged in appellant's proposed amended complaint.

Following his discharge, appellant sued respondent, alleging four causes of action, including state statutory claims of disability discrimination and retaliatory discharge, and common-law claims for intentional infliction of emotional distress and breach of contract. Respondent moved to dismiss the complaint with prejudice for failure to state a claim upon which relief can be granted. In opposing the motion to dismiss, appellant attached a proposed amended complaint to his memorandum and requested that the district court consider the amended complaint. At the hearing on respondent's motion to dismiss on July 10, 2013, appellant withdrew his breach-of-contract claim. After the hearing, appellant moved for leave to amend his complaint, attaching to his motion papers a second proposed amended complaint. The district court granted respondent's motion to dismiss for failure to state a claim upon which relief can be granted and denied appellant's motion for leave to amend.[2] This appeal followed.

D E C I S I O N

I.

A pleading may be dismissed under Minn. R. Civ. P. 12.02(e) "if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). On appeal from a district court's order dismissing a complaint under rule 12.02(e), we "review the legal sufficiency of the claim de novo." *Id.* "[W]e consider the complaint in its entirety, including the facts alleged

[2] The district court also denied respondent's motion for attorney fees. Issues relating to attorney fees are not preserved on appeal.

throughout the complaint and the attachments to the complaint." *Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth. of the City of Brainerd*, 821 N.W.2d 184, 192 (Minn. 2012). In doing so, we "must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

Breach of Contract

During oral argument, appellant contended that respondent did not follow its employee handbook. Appellant agreed to voluntarily dismiss his breach-of-contract claim at the district court hearing on respondent's motion to dismiss and did not appeal from the dismissal. To the extent that appellant is challenging the district court's dismissal of his breach-of-contract claim, his argument is without merit.

Intentional Infliction of Emotion Distress

Appellant argues that the district court erred when it applied a summary-judgment standard to his intentional-infliction-of-emotional-distress claim. The district court concluded that, even if respondent had issued corrective actions against appellant that contained false allegations, and even if he were, in fact, subjected to harassment and ridicule, respondent's actions did not "rise to the level of being utterly intolerable to the civilized community."

The district court did not apply a summary-judgment standard to appellant's intentional-infliction-of-emotional-distress claim. A high threshold applies to claims for intentional infliction of emotional distress, and "[i]t is for the court to determine whether, on the evidence, severe emotional distress can be found; it is for the jury to determine

whether, on the evidence, it has in fact existed." *Kuelbs v. Williams*, 609 N.W.2d 10, 17 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

To establish a prima facie claim for intentional infliction of emotional distress, appellant must plead facts showing that: (1) the tortious conduct was extreme and outrageous; (2) the tortfeasor acted intentionally or recklessly; (3) the conduct caused the injured party emotional distress; and (4) the distress was 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). A plaintiff has a "heavy burden" and "the limited scope of this cause of action . . . reflects a strong policy to prevent fictitious and speculative claims." *Id.*

Appellant's complaint alleges that "staff members at MRCI routinely subjected [him] to ridicule and harassment," and that respondent issued a corrective action report that contained "erroneous allegations." Appellant's conclusory allegation that "MRCI's knowingly wrongful corrective . . . actions, harassment and ultimate employment discharge of [appellant] was so extreme and outrageous that it passed the boundaries of decency and is utterly intolerable to the civilized community" does not allege "extreme and outrageous behavior." Even if respondent did make false allegations that appellant socialized with a client against company policy, that simply is not extreme or outrageous employer conduct. *See Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 865 (Minn. 2003) (concluding 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.)

Appellant did not plead facts sufficient to satisfy his heavy burden that respondent's conduct was extreme and outrageous.

Appellant's complaint alleges that he suffered "mental anguish, humiliation, embarrassment, and other damages . . ." as a result of respondent's actions. Appellant's conclusory statements are insufficient to survive a motion to dismiss. We have previously determined that such generalized complaints of distress are insufficient to amount to distress beyond what a reasonable person could be expected to endure. *See Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. App. 1995) (concluding that "insomnia, crying spells, a fear of answering her door and telephone, and depression" do not sustain an intentional infliction of emotional distress claim), *review denied* (Minn. July 27, 1995); *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. App. 1992) ("General embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress."), *review denied* (Minn. Dec. 15, 1992). The district court did not err in dismissing appellant's intentional-infliction-of-emotional-distress claim.

Minnesota Human Rights Act

The Minnesota Human Rights Act (MHRA) generally prohibits an employer from discharging an employee based on the employee's "race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age." Minn. Stat. § 363A.08, subd. 2 (2012). When making a claim under the MHRA, the employee must "present a prima facie case of discrimination by a preponderance of the evidence. This requires

[him] to present proof of discriminatory motive." *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986) (citation omitted). The employee can show discriminatory motive by direct evidence or by circumstantial evidence under the *McDonnell Douglas*[3] burden-shifting test. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

Under the *McDonnell Douglas* burden-shifting test, the plaintiff must first establish a prima facie case of discriminatory discharge. *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 918 (Minn. 2012). Then "the burden . . . shifts to the employer to articulate a legitimate and nondiscriminatory reason for the adverse employment action." *Id.* "The burden then shifts again to the plaintiff to put forward sufficient evidence to demonstrate that the employer's proffered explanation was pretextual." *Id.*

To satisfy the first prong of the *McDonnell Douglas* burden-shifting test, appellant must allege facts that, when taken as true, establish that (1) he has a disability under the definition of the MHRA; (2) he is qualified for his position; (3) respondent discharged him; and (4) respondent hired someone who was not disabled to fill his position. *Id.*

The MHRA defines a disabled person as someone 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 (2012).

[3] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973).

Appellant claims that he has an impairment that materially limits a major life activity. The district court concluded that appellant did not allege facts that he was disabled because appellant did not allege that he had indeed suffered a stroke, that he was incapable of performing major life activities, or that he suffers from a long-term impairment. In his appellate brief, appellant contends that the district court erred in not finding that memory loss was his impairment under the MHRA. At oral argument, appellant's attorney argued that appellant's depression and anxiety was the impairment. Because appellant's original complaint did not plead that he suffers from depression and anxiety, we are confined in reviewing the district court's grant of the motion to dismiss to considering memory loss as the claimed impairment. And the pleadings assert only a one-time memory loss of limited duration. Appellant does not allege memory loss after the date of his discharge.

The MHRA does not define "impairment." Because of the similarities between the MHRA and section 504 of the Rehabilitation Act, we are guided by the federal definition of "physical or mental impairment." *State by Cooper v. Hennepin Cnty.*, 441 N.W.2d 106, 110 (Minn. 1989). "Physical or mental impairment" is defined as

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine or . . . any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (2012).

And in our view, this definition of "impairment" includes ongoing conditions, but does not include transient conditions in the past that no longer impair the person. *Cf. Hoover*, 632 N.W.2d at 543-44 (concluding that plaintiff's fibromyalgia which caused her to suffer "severe headaches, sleeplessness, fatigue, chronic pain, and a depression-like state" raised a fact question regarding impairment under the MHRA); *State by Cooper*, 441 N.W.2d at 110 (stating that poor vision and high tone hearing loss were physical impairments); *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 553 (Minn. App. 2005) (stating that diabetes is an impairment under the MHRA); *Miller v. Centennial State Bank*, 472 N.W.2d 349, 351 (Minn. App. 1991) (stating that a trier of fact could reasonably conclude that sleep apnea was a physical impairment because it affected plaintiff's ability to sleep). Appellant alleges only a past loss of memory, and has not alleged any facts indicating that his brief moment of memory loss was anything other than transient. The district court did not err in concluding that appellant failed to allege facts that he had an impairment within the meaning of the MHRA.

Even if a transient occurrence of memory loss could be characterized as an impairment, appellant has not pleaded facts that are sufficient to state a claim that it materially limits a major life activity. Appellant does not plead any facts to show that his memory loss was the basis of his doctor's advice not to drive a vehicle for two weeks. Appellant must allege that his impairment was the reason he could not perform one or more major life activities. He argues that the district court erred in not inferring that appellant was instructed not to drive because of his memory loss. An inference is a logical, permissible deduction from proven or admitted facts. *State v. Meany*, 262 Minn.

491, 502, 115 N.W.2d 247, 255 (1962). "[An inference] cannot be based on a mere suspicion that unproved facts may exist." *Id.* We might be able to infer from the complaint that appellant told the doctor that he believed he was having a stroke, that he had a brief period of memory loss, and that he showed signs of emotional distress. But the basis for the doctor's instruction that appellant not drive for two weeks is neither alleged in nor evident from appellant's complaint.

Further, appellant failed to allege that he is qualified for his position and that he was replaced by someone without a disability, as required by the *McDonnell Douglas* burden-shifting test. *See Hansen*, 813 N.W.2d at 918. The district court did not err in dismissing appellant's MHRA claim.

Whistleblower

Appellant also claims that he was discharged because he had reported violations of state and federal law to respondent's representatives. Under Minnesota's whistleblower statute, an employer shall not discharge an employee because "the 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." Minn. Stat. § 181.932, subd. 1(a) (2012). Whistleblower claims are analyzed under the *McDonnell Douglas* burden-shifting test. *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007). "First, a plaintiff must establish a prima facie case of retaliatory action." *Id.* "A prima facie case of retaliatory discharge under the whistleblower statute requires the employee to demonstrate statutorily protected conduct by the employee, an adverse employment action by the employer, and a causal connection between the two." *Gee*, 700 N.W.2d at

555. "The causal connection requirement may be satisfied 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." *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995) (quotation omitted).

Appellant's complaint alleges that he alerted respondent's representatives that respondent violated state and federal law by "failing to conduct pre-trip and post-trip inspections," "requiring drivers to sign pre-trip and post-trip inspection reports that were filled out [by the] MRCI Transportation Director . . . and not the actual drivers," "routinely failing to provide disabled clients access to vehicle lifts and ramps," "forcing clients to stand at times they did not want to stand on buses," "failing to properly protect sensitive medical records contained in note books," and "allowing buses to operate despite known safety concerns." The district court concluded that appellant's initial complaint fails to allege any causal connection between the claimed reports of state and federal law violations and appellant's discharge.

Appellant's complaint does not allege any facts to support an inference of retaliatory motive or a causal connection between his earlier reports and his discharge by respondent after leaving a client unattended on a bus. Appellant neither provides dates for these reports nor identifies to whom he reported. Although appellant's complaints were made at a time close to his discharge, appellant's having left a vulnerable adult on his bus is an intervening event between his claimed reports and his discharge. *See Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695, 698 (8th Cir. 2006) (analyzing section 181.932

and concluding that "the presence of intervening events undermines any causal inference that a reasonable person might otherwise have drawn from temporal proximity").

At oral argument, appellant argued that respondent was waiting for an opportunity to dismiss him and that the incident on November 20, 2012 was simply its excuse. But appellant made no such allegation in his complaint, and it thus was not presented to the district court. The district court did not err in dismissing appellant's whistleblower claim.

II.

Respondent moved to dismiss appellant's complaint on June 7, 2013. At the hearing on respondent's motion to dismiss, appellant requested leave to amend his complaint and attached to his memorandum a proposed amended complaint. The district court did not grant appellant's informal request to amend because he did not formally move for leave to amend.[4] It was not until after respondent moved for, briefed, and argued its motion to dismiss that appellant formally moved for leave to amend and attached a second (and different) proposed amended complaint to the written motion.[5] The district court denied appellant's motion to amend because his proposed amended complaint still failed to state a claim upon which relief could be granted.

After a responsive pleading is served, "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given

[4] It is unclear whether the informal request was denied or simply not acted upon by the district court.

[5] Appellant was not prejudiced by being required to file a formal notice of motion and motion for leave to amend. It was within the district court's discretion to deny appellant's request for leave to amend because he did not file a formal motion. *See St. James Capital Corp. v. Pallet Recycling Assocs. of N. Am., Inc.*, 589 N.W.2d 511, 516 (Minn. App. 1999).

when justice so requires." Minn. R. Civ. P. 15.01. "We review a district court's denial of a motion to amend a complaint for an abuse of discretion." *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 714 (Minn. 2012), *cert. denied*, 133 S. Ct. 1249 (2013). "A district court should allow amendment unless the adverse party would be prejudiced, but the court does not abuse its discretion when it disallows an amendment where the proposed amended claim could not survive summary judgment." *Id.* (citations omitted). A district court acts within its discretion in denying a motion to amend if the motion "will accomplish nothing, such as when the amendment does not state a cognizable legal claim." *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). The district court does not abuse its discretion in denying a motion to amend "when the movant fails to establish evidence to support the allegations the movant seeks to amend." *Davis v. Midwest Disc. Sec., Inc.*, 439 N.W.2d 383, 388 (Minn. App. 1989).

Intentional Infliction of Emotional Distress

Appellant's second proposed amended complaint did not substantively amend any allegations relating to his claim of intentional infliction of emotional distress.[6] As discussed above, the district court properly granted respondent's motion to dismiss appellant's claim of intentional infliction of emotional distress for failure to state a claim on which relief can be granted.

[6] Appellant reworded one sentence, changing "MRCI's representatives . . . acted within *his* scope of employment" to "MRCI's representatives . . . acted within *their* scope of employment." (Emphasis added.) This change does not alter our analysis above.

MHRA

Appellant's proposed amended complaint changes the nature of his MHRA claim. Appellant's initial complaint alleged that appellant suffered from memory loss, which materially impaired his ability to perform his job duties. Appellant's proposed amended complaint is based on the new theory that his anxiety and depression materially limited major life activities. Appellant relies on the bare statement: "[Appellant's] disability substantially and materially limited [appellant's] ability to work, think, sleep, concentrate and his ability to retain memory of events material to the enjoyment of his life." This legal conclusion is insufficient to plead that appellant's depression and anxiety materially limited any major life activities. *See Bahr*, 788 N.W.2d at 80 ("A plaintiff must provide more than labels and conclusions [to survive a motion to dismiss]."). Appellant was required to plead how his mental impairment (depression and anxiety) materially affected his ability to perform these major life activities. His proposed amended complaint fails to do that.

Of even greater significance is that the proposed amended complaint fails to allege that appellant's anxiety and depression caused his memory loss on November 20, 2012, or that the doctor's direction that he should not drive for two weeks was based on concerns about depression and anxiety. His proposed amended complaint would not survive a motion to dismiss. *See Johnson*, 817 N.W.2d at 714.

Further, appellant's proposed amended complaint still does not allege facts indicating that he is qualified for the position from which respondent discharged him and that respondent replaced him with someone without his disability. We cannot speculate

about whether appellant would be qualified for his position as a driver if in fact his depression and anxiety causes memory loss, which in turn impairs his ability to drive. Even if we were to infer that, after two weeks, appellant could have driven and performed his job duties, his complaint fails to allege how a transient limitation would nonetheless continue to amount to a material limitation of a major life activity. The district court acted within its discretion in denying appellant's motion to amend concerning his MHRA claim.

Whistleblower

Appellant's initial complaint did not allege any causal connection between his complaints about state and federal law violations and his discharge. In his proposed amended complaint, appellant added the following allegations: (1) respondent's issuance of corrective actions and ultimate discharge "were taken because [respondent] did not believe that [appellant's] job responsibilities included taking actions to ensure compliance with all applicable laws material [to his job]" and (2) respondent's issuance of corrective actions and ultimate discharge "were specifically caused by [appellant's] repeated whistleblowing activity." The gist of appellant's amended whistleblower claim is based on the allegation that respondent did not believe appellant was responsible for reporting legal violations and that, because he did report, he was discharged. As discussed above, a prima facie case for a whistleblower claim requires that the employee demonstrate "statutorily protected conduct by the employee, an adverse employment action by the employer, and a causal connection between the two." *Gee*, 700 N.W.2d at 555.

Appellant's proposed amended complaint still fails to allege (other than in conclusory fashion) any causal connection between appellant's reports of state and federal law violations and his termination. Appellant does not allege a temporal connection. Neither does he allege any other facts demonstrating that respondent discharged him because of these reports. Even if appellant had sufficiently alleged that his reports and discharge were temporally related, his leaving a vulnerable adult alone on a bus (which he acknowledges) is still an intervening cause supporting appellant's discharge. And, other than inviting us to suppose that respondent was lying in wait for an excuse to discharge him, appellant's proposed amended complaint fails to allege any reason why leaving a vulnerable adult unattended should not be considered a reason for termination. The allegation that respondent did not believe it was appellant's responsibility to report state and federal law violations is insufficient to plead a causal connection between his reports and his discharge. The district court acted within its discretion in denying appellant's motion to amend concerning his whistleblower claim.

In sum, in considering respondent's motion to dismiss, the district court properly made reference to appellant's original complaint and properly granted that motion. The district court acted within its discretion in then considering and denying appellant's motion for leave to amend.

Affirmed.