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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1481**

Doreen Anderson,  
Appellant,

vs.

Fairview Health Services, Inc.,  
d/b/a Fairview Ridges Hospital,  
Respondent.

**Filed August 12, 2008  
Affirmed  
Worke, Judge**

Dakota County District Court  
File No. C2-06-9373

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Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and  
Connolly, Judge.

**UNPUBLISHED OPINION**

**WORKE**, Judge

Appellant challenges the district court's grant of summary judgment dismissing  
her reverse-discrimination and reprisal claims, arguing that the district court erred in  
concluding, as a matter of law, that appellant failed to present evidence sufficient to

support the determinations that the employer's legitimate reason for discharging her was a pretext for (1) reverse-racial discrimination, and (2) retaliation based on her complaint of discrimination. Because we conclude that the district court did not err in determining that appellant failed to show genuine issues of material fact of pretext in her discrimination and her retaliatory-discharge claims, we affirm.

## **FACTS**

Appellant Doreen Anderson was employed by respondent Fairview Health Services, Inc., d/b/a Fairview Ridges Hospital as an administrative financial representative from December 2002 until her discharge in May 2004. In the 13 months leading up to her discharge, appellant was disciplined 11 times concerning either her attendance or her interpersonal relationships with staff and patients. These reports included four advisements about attendance requirements and seven discussions about appellant's issues with interpersonal relationships with staff and patients. On one occasion in April 2004, respondent's vice president of finance and quality complained about an interaction with appellant when the vice president was registering as a patient. Despite the disciplinary reports, appellant's 2003 and 2004 performance reviews characterized appellant as "fully effective."

In March 2004, appellant, who is Caucasian, requested paid time off (PTO) for May 26, 2004, to attend her daughter's wedding. Respondent has a policy for PTO that includes both unscheduled time off (UTO) and scheduled time off (STO). Employees accrue PTO each pay period. In order to take PTO, employees must have a sufficient amount of PTO accrued when the request is made, when the vacation day is scheduled on

paper, and on the actual vacation day. Respondent maintains two advance schedules—an e-mail calendar that shows employee requests for PTO up to four months in advance and a printed calendar that shows whether a supervisor has verified that the employee has accrued sufficient PTO for the requested time off. The printed calendar is issued approximately one month in advance. When appellant requested PTO for May 26, Robin Hale, a Caucasian supervisor, emailed appellant that she had not yet accrued sufficient PTO hours to take May 26 off. Two weeks later, when appellant accrued sufficient PTO hours, she requested the day off again. Hale replied that appellant was conditionally approved for PTO on May 26, meaning that appellant was required to have sufficient PTO hours at the time the printed calendar was prepared. A notation was made on the e-mail calendar that appellant had requested May 26 off.

In April 2004, appellant also requested PTO for May 27. Terry Washington, an African American supervisor, was the supervisor responsible for handling this request. Washington contacted human resources and learned that appellant did not have sufficient PTO hours to take even one day off in May. Washington e-mailed appellant notifying her that she did not have enough PTO hours to take May 27 off. At some point, Washington changed the printed calendar to show that appellant was scheduled to work on May 26. Washington conceded that she did not send an e-mail informing appellant that she did not have sufficient hours to take May 26 off, but testified that sometimes employees were notified orally. Appellant then noticed that Washington had approved one week of PTO for A.G., a female African American employee who held the same position as appellant, even though A.G. had not accrued sufficient PTO hours when she

submitted the request. When appellant confronted Washington about the discrepancy, Washington told her to “take it up” with the business manager Darcy Scholl.

Appellant complained to Scholl, who is Caucasian, regarding her inability to take her requested PTO. Scholl testified that appellant asked her to “bend the rules,” and when she told appellant she would not, appellant stated that the situation was “unfair” and that appellant “was just going to call in sick that day.” Appellant testified that she complained to Scholl about racial discrimination; however, Scholl denied that appellant did so. Scholl testified that appellant told her that “if [Scholl] attempted to fire [appellant, Scholl] would pay for it.”

Appellant did not report to work on May 26. Scholl testified that she called appellant to ask her whether she knew she was scheduled to work that day. She testified that appellant stated, “it doesn’t matter because I’m not coming in to work and I don’t have time to deal with this”; however, appellant testified that she was not given the opportunity to come in to work that day. Appellant also testified that she knew that she had PTO approved on May 26 but that she did not look at the final printed calendar. Payroll records show that appellant had 21.08 hours of PTO accrued as of the pay period including May 26. Scholl consulted with human resources and discharged appellant. Washington was not working on the day appellant was discharged.

Appellant filed a charge of reverse-racial discrimination with the Minnesota Department of Human Rights and obtained the right to sue. In December 2005, appellant filed a complaint alleging that she was discharged on the basis of race in violation of the Minnesota Human Rights Act and subjected to reprisal. The district court granted

summary judgment in favor of respondent on both claims. The district court concluded that appellant had failed to show that genuine issues of material fact existed on whether her discharge was a pretext for discrimination and that appellant's "argument that she was discharged for complaining to Scholl is not supported by admissible facts that would allow an inference of retaliatory discharge." The appeal follows.

## D E C I S I O N

On appeal from summary judgment, this court asks whether any genuine issues of material facts exist and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is proper if "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). "To forestall summary judgment, the nonmoving party must do more than rely on unverified or conclusionary allegations in the pleadings or postulate evidence which might be produced at trial." *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998) (quotation omitted). Rather, that party "must present specific facts which give rise to a genuine issue of material fact for trial." *Id.*

## I

Appellant alleges that respondent discriminated against her on the basis of her race by discharging her in May 2004 in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.08, subd. 2 (2006). The statute provides that "it is an

unfair employment practice for an employer, because of race, color . . . [to] discharge an employee; or [] discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.” Minn. Stat. § 363A.08, subd. 2. In construing the MHRA, this court applies Minnesota caselaw and law developed in federal cases under Title VII of the 1964 Civil Rights Act. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

When analyzing employment-discrimination claims under the MHRA, Minnesota courts use the three-part test enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719-20 (Minn. 1986). Under this analysis, an employee alleging discrimination must first establish, by a preponderance of the evidence, a prima facie case of discrimination. *Id.* at 720. This requires proof of a discriminatory motive, which may be established either by direct evidence or may be indirectly inferred. *Id.* If the burden of showing a prima facie case is met, the employer then has the burden to produce evidence that there was a legitimate, nondiscriminatory reason for its actions. *Id.* At this step, the employer must present evidence that its action was related to a legitimate business purpose. *Id.* If the employer produces such evidence, the burden shifts back to the employee to show that the reason given by the employer was a pretext for unlawful discrimination and that the employer “intentionally discriminated against” the employee. *Id.* The specific elements of the *McDonnell-Douglas* analysis may be modified for varying factual patterns and employment contexts. *Id.*

The district court granted summary judgment in favor of respondent, concluding that appellant failed to raise a material factual issue on whether her discharge was pretextual. Because we review a district court's grant of summary judgment de novo, we will examine all three prongs of the *McDonnell-Douglas* test.

***Prima facie case***

Appellant argues that she established sufficient facts to establish a prima facie case of discriminatory discharge. A prima facie case in a discriminatory-discharge case requires a showing that the plaintiff is a member of a protected class, she was qualified for the position in which she was employed, and despite her qualifications, she was discharged and either replaced by a nonmember of the protected class, or "other similarly situated" employees who were not members of the protected class "were not discharged for nearly identical behavior." *Swanigan v. W. Airlines, Inc.*, 396 N.W.2d 607, 612 (Minn. App. 1986), *review denied* (Minn. Jan. 21, 1987). To make the showing required at this stage, an employee must show that she and another employee were "involved in or accused of the same or similar conduct and [were] disciplined in different ways." *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 851 (8th Cir. 2005) (quotation omitted). This is a "low-threshold" standard. *Id.* at 852.

In the context of a reverse-discrimination claim, the plaintiff must also show that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Woods v. Perry*, 375 F.3d 671, 673 (8th Cir. 2004) (quotation omitted). A plaintiff can show suspicious background circumstances by showing evidence that the employer is "inclined to discriminate

invidiously against [Caucasians] or something ‘fishy’ about the facts that raises an inference of discrimination.” *Id.* at 674.

Appellant has alleged several facts indicating that appellant and A.G. engaged in the same conduct—requesting PTO when they had not yet accrued the requisite number of hours to request it—and that A.G. was allowed to take PTO, while appellant was not. In addition, appellant has alleged several background circumstances that could give rise to an inference of reverse discrimination. These include: (1) a Caucasian supervisor was forced to leave after Washington complained of racial discrimination; (2) Washington received disciplinary warnings but was not discharged; and (3) another minority employee was allowed time off that was not allowed to appellant. We conclude that under the “low-threshold” test in *Rodgers*, this evidence is sufficiently probative of appellant’s claim that she was treated differently because of her race to support her prima facie case of discrimination. *See Rodgers*, 417 F.3d at 852-52 (concluding that plaintiff satisfied the initial burden of prima facie case of discrimination when showing that she and another employee were treated differently for violating the same policy).

***Legitimate, Nondiscriminatory Reason***

Once appellant has established a prima facie case, the burden then shifts to respondent to show that it had a legitimate, nondiscriminatory reason for discharging appellant. Appellant alleges a factual dispute as to whether she was entitled to PTO when she failed to show up for her scheduled shift the day she was discharged. But she does not dispute that her poor work performance gave respondent legitimate,

nondiscriminatory reasons for terminating her. Therefore, respondent has satisfied its burden under the second prong of the *McDonnell-Douglas* analysis.

***Pretext***

Because respondent has shown a legitimate, nondiscriminatory reason for discharging appellant, under the third prong of the *McDonnell-Douglas* test, appellant must then produce evidence showing that respondent's reasons were a pretext for discrimination or are not worthy of belief. *Feges v. Perkins Restaurant*, 483 N.W.2d 701, 711 (Minn. 1992).

Appellant argues that A.G. was similarly situated and was not subject to the same standards as appellant and was not disciplined for the same behavior. At the pretext stage, the test for determining whether employees are similarly situated is a "rigorous" one. *Rodgers*, 417 F.3d at 853. "[T]he individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *EEOC v. Kohler Co.*, 335 F.3d 766, 779 (8th Cir. 2003) (quotation omitted). To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of "comparable seriousness." *Id.* (quotation omitted).

Appellant alleges that because A.G. was allowed to take PTO even though she did not have enough time accrued to do so and was not disciplined or terminated for excessive absenteeism, A.G. was a proper comparator for purposes of establishing pretext. But under the "rigorous" standard set forth in *Rodgers*, we cannot conclude that A.G. was similarly situated to appellant. The record shows that A.G. had three warnings

for absences and one additional warning over a five-year employment history. But appellant received eleven disciplinary warnings over an eighteen-month period, including warnings for inappropriate interactions with staff and a patient. In addition, Scholl testified that “any time” she addressed attendance issues with A.G., A.G. made the requested improvements. Scholl testified that, on the other hand, she terminated appellant because “[appellant] had many other issues besides absenteeism,” including “confrontational [behavior] with both employees [and] patients, and actually offensive language to those that she worked with.” Thus, the record shows that A.G.’s conduct was not “of comparable seriousness” to that of appellant, and appellant has failed to show that A.G. is an appropriate comparator in the analysis of pretext under the third prong of the *McDonnell-Douglas* test.

Appellant also maintains that “[respondent’s] changing and mixed motives for [appellant’s] discharge is evidence of pretext for discrimination.” She argues that the district court improperly considered evidence of her prior disciplinary history, rather than the immediate circumstance of her failing to report for her scheduled shift, as a motive in her termination.

If an employee shows both a lawful and an unlawful reason for terminating an employee, the employee can sustain his burden of proof by showing that the employer was more likely than not motivated by the unlawful reason. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 627 (Minn. 1988). But respondent is not precluded from terminating appellant for more than one reason when neither of these reasons is pretextual. And even if respondent failed to properly rescind appellant’s conditional

approval of her PTO on May 26, this does not justify appellant's failure to report for work on that day or establish an inference that appellant was terminated because of her race. Further, although "substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext, this does not mean that an employer cannot elaborate on its proffered reason." *Rodgers*, 417 F.3d at 855 (quotation and citation omitted). Respondent's human-resources director, in responding to appellant's MHRA charge, indicated that appellant's termination was a result of not working a scheduled shift and her inappropriate behavior. And Scholl testified in this proceeding that she discharged appellant based on appellant's confrontational behavior with both staff and patients. Therefore, appellant did not show sufficient evidence of conflicting justifications for her discharge to support an inference that her discharge was pretextual.

The district court also noted that the record contains no evidence of intentional discrimination, other than appellant's subjective belief that she was being discriminated against because of her race. We agree. Appellant testified that she believed she was being discriminated against because she is Caucasian and that her negative reports were "brought up by [Washington]," who is African American. But appellant also testified that she was "not sure" whether her discipline was related to her race. Appellant's subjective belief, without more, cannot raise a genuine issue of material fact regarding a discriminatory motive for her discharge. *See Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833, 841-42 (7th Cir. 1996) (stating "if the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues

of material fact, then virtually all defense motions for summary judgment in such cases would be doomed”).

We agree with the district court that appellant has failed to show a genuine issue of material fact on whether her discharge was a pretext for discrimination under the third prong of the *McDonnell-Douglas* test. Therefore, we affirm the grant of summary judgment in favor of respondent on appellant’s reverse-discrimination claim.

## II

Appellant argues that the district court erred in granting summary judgment in favor of respondent on appellant’s retaliatory-discharge claim. “It is an unfair discriminatory practice for an individual who has participated in the alleged discrimination . . . to intentionally engage in any reprisal against [a] person” who has filed a charge of discrimination under the MHRA. Minn. Stat. § 363A.15 (2006). Minnesota courts consider a reprisal claim under the *McDonnell-Douglas* burden-shifting analysis. *Fletcher*, 589 N.W.2d at 101. A prima facie case for reprisal requires: “(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.” *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 548 (Minn. 2001) (quotation omitted).

The district court accepted, for the purpose of summary judgment, appellant’s contention that she had engaged in statutorily-protected conduct and that respondent had committed an adverse employment action. But the district court determined that appellant had failed to present sufficient admissible facts to allow a fact-finder to

determine that there was a causal connection between her reverse discrimination claim and her discharge.

Under Minnesota law, the “causal connection [requirement] may be demonstrated indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time.” *Hubbard v. United Press Int’l*, 330 N.W.2d 428, 445 (Minn. 1983). Because appellant contends that she was discharged five days after she complained to her supervisor about reverse discrimination, we agree with appellant that the timing of her discharge may raise an issue of material fact on whether a causal connection exists between protected conduct and her discharge for the purpose of establishing a prima facie case. But in order to withstand summary judgment on her retaliatory-discharge claim, appellant must also show a material factual issue on the issue of pretext under the third prong of the *McDonnell-Douglas* analysis. *See Hoover*, 330 N.W.2d at 446. In *Hoover*, the Minnesota Supreme Court concluded that, although the timing of plaintiff’s discharge raised an inference of causation sufficient to satisfy that element of the plaintiff’s prima facie case, that inference was rebutted by evidence that the decision to discharge was not made in retaliation for protected conduct. *Id.* Similarly, we conclude that respondent has rebutted appellant’s retaliatory-discharge claim with evidence showing that her discharge was not a pretext for action based on complaints of discrimination. Appellant’s employment file contains numerous disciplinary warnings, which amply support respondent’s decision to discharge her. And other than appellant’s speculation, the record contains no evidence that the

articulated reason for her discharge was a pretext for a real reason of retaliating against appellant for reported discrimination. Therefore, we affirm the district court's grant of summary judgment on appellant's retaliatory-discharge claim.

**Affirmed.**