STATE OF MINNESOTA
IN COURT OF APPEALS
A10-579

Delonn D. Wade,
Appellant,

vs.

ATMI Packaging, Inc.,
Respondent.

Filed December 21, 2010
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-09-881

Larry B. Leventhal, Leventhal & Associates, St. Paul, Minnesota (for appellant)

Ashley A. Wenger, Ogletree Deakins Nash Smoak & Stewart, P.C., Minneapolis, Minnesota; and

Peter O. Hughes (pro hac vice), Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Morristown, New Jersey (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

CONNOLLY, Judge

After his termination, appellant brought this action pursuant to the Minnesota Human Rights Act (MHRA) against respondent, his former employer, alleging various claims including disparate impact, racial discrimination, and a hostile work environment. Respondent moved for and was granted summary judgment. Because there is no genuine issue of material fact and respondent was entitled to judgment as a matter of law, we affirm.

FACTS

Respondent ATMI Packaging Inc. designs and manufactures packaging products for specialized industries. Appellant Delonn Wade, who is African American, worked for respondent as a machine operator from 1999 until 2008, when he was terminated for performance deficiencies and violations of respondent's Zero Tolerance Policy.

Performance Deficiencies

Until October 2006, appellant's performance was satisfactory, but that month he received a formal warning and was told that he must "pay closer attention to details" because he "let three liners with missing layers pass his inspection." He was again formally warned in February 2007, and told to "pay closer attention to details when performing job duties" because of five incidents: two in December 2006, when he "[f]orgot to put spongy rubber on the pressure bars . . . caus[ing] extra downtime . . . [and a risk of] weld failures" and "snapped a roll . . . caus[ing] downtime and scrap"; one in January 2007, when he "let the film pull backwards . . . caus[ing] downtime and

scrap"; and two in February 2007, when he "removed film . . . and did not make a new film tag for the remaining film . . . caus[ing] additional time to correct and inventory discrepancies" and, two days later, "changed over to the wrong size liner . . . caus[ing] additional downtime and scrap."

In early 2007, appellant's annual performance evaluation gave him a score of 2.4 out of a possible 5. Appellant's own comments in the employee comment section of his evaluation stated that he would "[b]e more aware of problems" with the machines and would "get back from breaks on time and get more efficient" with certain procedures. But further problems occurred later in 2007. In October, appellant, "[w]hen changing to a new shop order[,] . . . did not split the film tags to reflect the film used on the previous job and the film to be used on the next job . . . [a] serious mistake that will directly effect [sic] cycle counts and shop order variances." Appellant was given another formal warning and told that there would be "a daily audit of [his] paperwork for two weeks . . . ." In December, appellant "[w]hen . . . chang[ing] the long heater[, appellant] . . . forgot to put it back in the same position, causing scrap" and "[w]ithin minutes . . . let a film roll snap . . . [H]e had just walked by the roll before changing the heater out." The formal warning that appellant received for the December incidents informed him that, if another violation occurred, he could "be subject to further disciplinary action up to and *including termination*." (Emphasis added.)

Violations of the Zero Tolerance Policy

Respondent's Zero Tolerance Policy states, "We do not tolerate behavior of a threatening, intimidating, disrespectful, illegal, or harassing nature." In December 2007,

respondent's human resources generalist (HRG) and appellant's upper-level supervisor heard from the process advisor (PA) of appellant's shift that appellant had threatened to get the PA fired or demoted: "Watch, I'm going to get [the PA. He] is going to be next." The HRG and the supervisor also heard that appellant, when angry with the PA, had threatened to "beat [the PA's] ass." The HRG and the supervisor concluded that both threats were violations of the Zero Tolerance Policy.

To update appellant's performance evaluation from early 2007, the HRG and the supervisor asked appellant's immediate supervisor to provide written observations on appellant's performance. His observations were consistent with appellant's 2007 performance review and written warnings: he noted that appellant was more reactive than proactive in dealing with machines, leading to increased scrap; that his paperwork was not accurate; that he was often one of the last people back from breaks and lunch; that he was loud and boisterous, which could be enjoyable to some but offensive to others; and that he needed to take his job more seriously, stay focused, pay attention to the machines, and be sure his paperwork was correct.

Based on appellant's performance record and his violations of the Zero Tolerance Policy, the HRG and the supervisor decided to terminate his employment. Appellant then brought this action, alleging that respondent had a layoff policy that had a disparate impact on African American employees, that racial discrimination in violation of the MHRA was the real basis for appellant's termination, and that respondent had created a racially hostile work environment.

D E C I S I O N

On an appeal from summary judgment, this court asks whether there are any genuine issues of material fact 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). Both issues are reviewed de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

1. Disparate Impact[1]

A prima facie case for disparate impact requires "(1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two." *Mems v. City of St. Paul, Dep't. of Fire & Safety Servs.*, 224 F.3d 735, 740 (8th Cir. 2000); *see also* Minn. Stat. § 363A.28, subd. 10 (2010) (complaining party must show employment practice "is responsible for a statistically significant adverse impact on a particular class of [protected] persons").

Neither in his brief nor in response to questioning at oral argument did appellant show an identifiable, facially-neutral personnel policy or practice of respondent that had a disparate effect on African American employees. Moreover, the number of respondent's African American employees ranged from seven in 2007 to three in 2009, and a sample size that "ranged from three to seven . . . [is] too small to be statistically significant." *Mems*, 224 F.3d at 740; *see also Kohlbek v. City of Omaha*, 447 F.3d 552, 557 (8th Cir. 2006) ("Numbers must be *statistically significant* before one can properly conclude that

[1] Appellant alleged but did not specifically claim disparate impact in his complaint. The district court treated the allegation as a claim.

any apparent racial disparity results from some factor other than random chance." (quotation omitted)).

Appellant refers to the "practice of terminating black employees based on violation of the Zero Tolerance policy, alleged poor performance, outsourcing, and department changes," but does not show that respondent terminated only African-American employees for these reasons or that all employees terminated for these reasons were African-American. The record shows that both African-American and Caucasian employees were terminated because of outsourcing and that at least one Caucasian employee was terminated for violation of the Zero Tolerance Policy. An employee who appellant says also violated the policy was not terminated, but, unlike appellant, that employee had no poor performance record.

Appellant has not produced evidence that respondent's termination practices have a disparate impact on a statistically significant number of African-American employees. The disparate impact claim was properly dismissed.

2. MHRA Claim

Appellant challenges the summary judgment dismissing his MHRA claim of racial discrimination. The view that summary judgment "is generally inappropriate in discrimination cases" has been explicitly rejected. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 326 n.9 (Minn. 1995).

Minnesota has adopted the three-part test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), to analyze MHRA claims. *Id.* at 323. The first part requires the plaintiff to establish a prima facie case of discrimination. *Id.* For

purposes of the summary judgment motion, respondent conceded that this part has been met. The second part requires the defendant to articulate some legitimate, nondiscriminatory reason for the action of which the plaintiff complains. *Id*. Respondent states that appellant's "poor performance, threats of violence, and conspiring to get a co-worker fired" were legitimate bases for his termination. In the third part, the burden of proof shifts back to the plaintiff, who "must put forth sufficient evidence for the trier of fact to infer that the employer's proffered legitimate nondiscriminatory reason is not only pretext but that it is pretext for discrimination." *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 546 (Minn. 2001). Appellant presents six arguments,[2] but none of them would enable a trier of fact to infer that respondent's reasons for terminating appellant were a pretext for discrimination.

First, appellant argues that the HRG and the supervisor gave inconsistent reasons for his termination. But their testimony was not inconsistent: both gave appellant's poor performance as the first reason and his violations of the Zero Tolerance Policy as the second reason. The fact that the HRG specified appellant's physical threat against the PA and the supervisor specified appellant's threat to have the PA fired does not render their testimony inconsistent.

Second, appellant argues that evidence shows that the performance problems respondent used as a basis to terminate him were pretextual not because any of the nine

[2] Appellant's argument that, even if respondent had a legitimate reason for terminating him, evidence shows that a factual issue exists as to whether discriminatory animus was, more likely than not, a motivating reason for the termination is merely a reiteration of some of his other arguments.

performance incidents was inaccurately reported but because other employees would not have been criticized for such incidents. He provides no evidentiary support for this argument. Appellant does not allege any racial bias on the part of the supervisors who issued the warnings, but argues that the PA, who he alleges was racially biased, caused the warnings to be issued. But another employee testified that, while the PA had said he did not like appellant, this was not because of appellant's race.

Third, appellant argues that a jury could find racial bias in the update report that his immediate supervisor prepared because such update reports were not prepared on other employees. But appellant does not accuse either of his supervisors or the HRG of racial bias; the HRG testified that the report was requested because appellant's immediate supervisor was "the best source for information about [appellant's] performance"; and the immediate supervisor testified that the report was consistent with his previous evaluations of appellant's performance. Appellant also alleges that a jury could find racial bias because "all black employees were terminated," but this assertion is contradicted by the record. Documents show that, in 2007, respondent employed 151 people, of whom 7 were African American; in 2008, it employed 134, of whom 6 were African American; in 2009, it employed 79, of whom 3 were African American.

Fourth, appellant claims disparate treatment because another employee who also said he wanted the PA fired was not terminated. But there were no problems with that employee's performance. *See Equal Emp't Opportunity Comm'n v. Kohler Co.*, 335 F.3d 766, 775-76 (8th Cir. 2003) (noting that "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"). Appellant also argues that, since the PA wanted appellant fired, the PA should have been fired. But the PA's statements about appellant were never brought to the attention of the HRG or any supervisor.

Fifth, appellant argues that he is entitled to "all favorable inferences" that respondent's proffered reasons, i.e., appellant's performance and his violations of the Zero Tolerance Policy, mask "the real reason of intentional discrimination" because conflicting evidence shows that the proffered reasons are untrue. But appellant has not provided conflicting evidence showing that respondent's proffered reasons were untrue: nothing in the record refutes the information on appellant's performance problems or his violations of the Zero Tolerance Policy.

Finally, appellant argues that summary judgment is inappropriate even if respondent did have a legitimate reason for terminating him because evidence shows a factual issue exists as to whether discriminatory animus was, more likely than not, a motivating reason for the termination. *See Anderson v. Hunter, Keith Marshall & Co*., 417 N.W.2d 619, 626 (Minn. 1988) (rejecting view that "employers, definitionally guilty of prohibited employment discrimination, [may] avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge"). But the record is devoid of any such evidence.

The grant of summary judgment by the district court dismissing appellant's claims of discrimination was not precluded by a genuine issue of material fact, and respondent was entitled to judgment as a matter of law.

3. Hostile Work Environment[3]

> To prevail on a hostile work environment claim, a plaintiff must establish that (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment; and (5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action. . . . [D]iscriminatory harassment . . . is not actionable unless it is so severe or pervasive as to alter the conditions of the [plaintiff's] employment and create an abusive working environment. The objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Goins v. West Group, 635 N.W.2d 717, 725 (Minn. 2001) (alteration in original) (quotations and citations omitted).

The only person appellant accused of discriminatory conduct was the PA. But appellant himself testified that the PA's conduct was equally directed at Caucasian employees:

> [I]f the machine breaks down, we have to stop. So my job is to call [my immediate supervisor, a white employee] . . . . [The PA] will come in and just scream on me why the machine is not running. I told him the reason why the machine's not running. My answer's not good enough. So he'll go ream at [my immediate supervisor] . . . . But then [my immediate supervisor] would come back and say, Well, I don't know why [the PA] is screaming at me. What can I do? The machine is down.

[3] Appellant did not specifically state a hostile work environment claim, but the district court treated his allegation of hostile work environment as a claim.

Thus, even if the PA's conduct was harassment, it was not based on appellant's membership in a protected group. Nor did the PA's conduct create an abusive working environment: appellant testified that he liked the people he worked with and "never really looked [for another] job."

A consideration of the totality of the circumstances of appellant's employment indicates that he cannot bring a hostile work environment claim, and that claim was also properly dismissed.

Affirmed.