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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1669**

Denise Day,
Appellant,

vs.

Metropolitan Council,
Respondent.

**Filed May 7, 2012
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CV1012708

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

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the district court's award of partial summary judgment in favor of respondent, arguing that the district court abused its discretion by granting respondent's motion to exclude evidence of a threat of retaliation allegedly made to one

of respondent's employees by respondent's outside counsel in a different lawsuit and erred by determining that she was collaterally estopped from retrying issues decided in arbitration. We affirm.

FACTS

Appellant Denise Day began working for respondent Metropolitan Council on a part-time basis in 2000 and was later promoted to a full-time bus operator. In 2006, appellant was hospitalized for a pulmonary embolism and placed on restricted-duty status, which prohibited her from working around bus fumes. In July 2007, appellant's employment was terminated for reasons disputed by the parties.

Appellant filed a lawsuit, asserting claims of disability discrimination in violation of the Minnesota Human Rights Act (MHRA) and worker's compensation retaliation (the 2007 lawsuit). The parties entered into a settlement agreement resolving the lawsuit in late 2008. Under the agreement, appellant would return to work for respondent in the customer-relations department as a Customer Service Representative (CSR) and begin training with Linda Bechtold.

Up until appellant was offered the position, respondent had employed five CSRs. According to respondent's human-resources director, "there were no existing, open positions for which [appellant] was qualified, but [respondent] did have pending a request for the creation of an additional . . . CSR." Respondent therefore "decided to create the position, fund it through a transfer of authorized funds from the Transportation Division's full-time equivalent allotment to the Customer Service Unit, and offer the position to [appellant] in consideration for the dismissal" of the 2007 lawsuit.

Appellant began training as a CSR on November 17, 2008. Following a training period, her employment was terminated on January 23, 2009. Appellant believed that respondent “never provided a legitimate course of training” and singled her out, subjecting her to “retaliatory, hostile and adverse treatment that was different from how [two other] new CSR trainees . . . were treated.”

Amalgamated Transit Union—the Union that represented appellant—filed a grievance regarding appellant’s termination for an arbitration proceeding pursuant to a collective bargaining agreement. Several witnesses, including appellant and Bechtold, testified at the four-day arbitration. The arbitrator denied the grievance, finding that appellant’s employment was terminated for sufficient just cause. In arriving at this conclusion, the arbitrator rejected a number of factual arguments raised on appellant’s behalf, including that the totality of her training and evaluation occurred in a hostile environment, that she was subjected to different standards of achievement than other trainees, and that Bechtold was biased against her and denied her a neutral evaluation.

The arbitrator concluded that appellant failed to achieve satisfactory progress in her training, and that this constituted sufficient cause for discharge. Specifically, the arbitrator found that appellant was never able to successfully perform the essential duties of the CSR position and had performed more poorly than any trainee had performed in the past. The arbitrator therefore rejected the contention that there was a plot to prevent appellant from succeeding in the CSR position.

Appellant then filed the present lawsuit, asserting claims of breach of contract and reprisal in violation of the MHRA. The breach-of-contract claim asserted that respondent

had breached the settlement agreement from the 2007 lawsuit by subjecting appellant to retaliatory, hostile, and adverse treatment. Specifically, appellant argued that respondent breached the agreement's covenant of good faith and fair dealing by evaluating her differently from other trainees, failing to follow standard procedures to investigate appellant's complaints, hiring her into a position that did not actually exist, and failing to offer her any assessment to determine her competency for the position. Appellant also argued that respondent had engaged in reprisal against her for filing the 2007 lawsuit and complaining about the unfair treatment she had received. Appellant asserts that she was treated differently from other CSR trainees in an effort to justify an illegitimate termination decision motivated by retaliation.

The parties filed cross-motions for summary judgment. Following a hearing, the district court granted respondent's motion for summary judgment in part, holding that appellant was collaterally estopped from "relitigating facts that were necessary, essential, and relevant to the arbitrator's just cause for termination ruling, including whether:

- (1) [appellant] was treated unfairly or differently from others during training;
- (2) Bechtold was motivated to fabricate a case for [appellant]'s discharge; and
- (3) [appellant] was discharged for reasons unrelated to her performance." The district court denied motions for summary judgment on appellant's reprisal and breach-of-contract claims related to whether the position had been offered in good faith, because genuine issues of material fact existed related to those claims. The district court also granted respondent's motion in limine to exclude testimony of another employee

allegedly being threatened in relation to deposition testimony given as part of the 2007 lawsuit. This appeal follows.

D E C I S I O N

Before beginning our analysis of the merits of appellant's arguments, the unusual procedural history of this case warrants brief discussion. The district court granted partial summary judgment. An appeal may be taken from a final judgment or from a partial judgment entered pursuant to Minn. R. Civ. P. 54.02. Minn. R. Civ. App. P. 103.03(a). An appeal may be taken from a partial judgment under rule 54.02 only when the district court makes an express determination that there is no just reason for delay and expressly directs the entry of a final judgment. Minn. R. Civ. App. P. 104.01, subd. 1. But the district court's use of the express determination does not necessarily make the partial judgment a final judgment under the rule; rather, rule 54.02 applies when a lawsuit is based on more than one legal theory or states more than one group of operative facts giving rise to relief. *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 (Minn. 2009).

Here, the dismissed MHRA and breach-of-contract claims are based on a different group of operative facts than are the remaining claims. The judgment before us here was therefore subject to certification for immediate appeal under Minn. R. Civ. P. 54.02 because it adjudicated an entire claim. We therefore accepted the appeal to allow for the immediate review of the partial judgment.

I.

Appellant sought to introduce the testimony of J.G., a current employee of respondent who had given a deposition during the 2007 lawsuit. According to the record, J.G. would have testified that, following her deposition, respondent's counsel told J.G. that she could lose her job because of her deposition testimony and instructed her to "warn another witness she could be fired too." Respondent's counsel denies making any such statement. Respondent brought a motion in limine to strike the testimony, and the district court granted the motion, holding that the evidence was irrelevant or in the alternative that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Appellant challenges this ruling.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Korning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.* at 46.

"Evidence which is not relevant is not admissible." Minn. R. Evid. 402.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. And while relevant evidence is generally admissible, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403.

Appellant argues that J.G.’s testimony is admissible because it shows respondent’s “retaliatory animus in employment lawsuits” and as “me too” evidence under Minn. R. Evid. 404(b). The United States Supreme Court has determined that such evidence is neither per se admissible nor per se inadmissible. *Quigley v. Winter*, 598 F.3d 938, 951 (8th Cir. 2010) (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386–88, 128 S. Ct. 1140, 1146 (2008)).

As support for her argument that the evidence of the threats allegedly made by respondent’s counsel to other employees is relevant, appellant relies primarily on *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261 (11th Cir. 2008). We disagree that *Goldsmith* applies. The court in *Goldsmith* required not only that the potential-witness coworkers were supervised by the same supervisor, but also that “the decision maker was aware of the protected conduct at the time of the adverse employment action.” 513 F.3d at 1278 (quotation omitted). Here, the record does not support that Bechtold was aware of the 2007 lawsuit or the threats allegedly made by respondent’s counsel at the time appellant’s employment was terminated. Furthermore, the statements were allegedly made by outside counsel rather than by an employee of respondent with any supervisory or employment-termination authority.

We therefore conclude that the district court correctly determined that J.G.’s testimony was not admissible as “me too” evidence and was not relevant to the issue at hand—namely whether respondent breached the settlement agreement or committed

reprisal against appellant in violation of the MHRA. The district court did not abuse its discretion by granting respondent's motion in limine to exclude the evidence.

II.

“A motion for summary judgment shall be granted when 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 a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On an appeal from summary judgment, an appellate court asks two questions: “(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “[An appellate court] review[s] de novo whether a genuine issue of material fact exists” and “whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). “[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio*, 504 N.W.2d at 761.

Here, the district court granted respondent's summary-judgment motion after concluding that the collateral-estoppel doctrine prevented appellant from relitigating the facts that were necessary, essential, and relevant to the arbitrator's just-cause-for-termination ruling, specifically (1) whether appellant was treated unfairly or differently from other CSR trainees; (2) whether Bechtold was motivated to fabricate a case for appellant's discharge; and (3) whether appellant was discharged for reasons unrelated to her performance. Having incorporated the arbitrator's factual findings on these issues,

the district court concluded that respondent was entitled to judgment as a matter of law as to appellant's reprisal and breach-of-contract claims that relied on those facts.

The availability of collateral estoppel is a mixed question of law and fact subject to de novo review. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996). But if collateral estoppel is available, this court will not reverse a district court's decision to apply the doctrine absent a "demonstrated abuse of discretion." *Pope Cnty. Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Res judicata, which operates to preclude a subsequent lawsuit on the same cause of action, bars both matters actually litigated and those other claims or defenses that could have been litigated. *Roseberg v. Steen*, 363 N.W.2d 102, 105 (Minn. App. 1985); *see also Anderson v. Werner Continental, Inc.*, 363 N.W.2d 332, 335 (Minn. App. 1985) (stating for purposes of res judicata, that identical-claims test is met "if the same operative nucleus of facts is alleged in support of the claims"), *review denied* (Minn. June 24, 1985). Application of collateral estoppel to preclude relitigation of an issue is appropriate "where (1) the issue [is] identical to one [decided] in a prior adjudication; (2) there [is] a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party [had] a full and fair opportunity to be heard." *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984). We address each element in turn.

A. Identical issue

For collateral estoppel to apply, "[t]he issue on which collateral estoppel is to be applied must be the same as that adjudicated in the prior action and it must have been

necessary and essential to the resulting judgment in that action. The issue must have been distinctly contested and directly determined in the earlier adjudication”

Hauschildt v. Beckingham, 686 N.W.2d 829, 837–38 (Minn. 2004) (citations omitted).

Here, the district court concluded that “nearly every factual claim [appellant] asserts in support of her reprisal and breach of contract causes of action was actually litigated by the parties and decided by the arbitrator.”

The arbitrator was asked to determine whether appellant’s termination was for “just cause” or whether it was a result of her being “‘set up for failure’ by the total circumstances of her required training and evaluation process in a hostile working environment.” The statement of the grievance submitted by the Union directly references allegations of discrimination by asserting violation of Article I, Section 2 of the CBA.

After reviewing the evidence, the arbitrator found that the record did not support a finding of grossly unfair treatment and assessment and was “totally void” of any basis for a finding of discriminatory intent on the part of respondent. These findings were “necessary and essential” to the arbitrator’s decision that appellant’s termination was not in violation of Article 1, Section 2—in other words, the findings were required to find that appellant had not been discriminated against. *See Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145, 2152 (2009) (“A determination ranks as necessary or essential only when the final outcome hinges on it.”). The first element of the collateral-estoppel doctrine is therefore met.

B. Final judgment

In order for collateral estoppel to preclude relitigation of an issue, there must have been a final judgment on the merits. *Kaiser*, 353 N.W.2d at 902. The district court found that the arbitrator's decision "constitutes a final judgment on the merits for estoppel purposes."

Appellant briefly asserts that the district court erred by determining that the arbitrator's decision was a final judgment on the merits. But her argument simply restates her arguments on the other issues. And appellant offers no citation or legal argument for why the district court erred by concluding that the arbitrator's decision was a final judgment on the merits for estoppel purposes. *See Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 651 (Minn. 1990) (recognizing that Minnesota courts afford finality to an arbitration award as a final judgment of both law and fact). Her argument on this element, however unavailing, has therefore been waived, and we do not address it further. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating an assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating court will decline to address issues unsupported by legal analysis or citation).

C. Privity

A party will only be estopped from relitigation of an issue if the party was either a party to or in privity with a party to the prior adjudication. *Kaiser*, 353 N.W.2d at 902.

Here, the district court found that respondent had met its burden in proving that appellant was in privity with her Union, which was a party to the arbitration.

In addition to finding that respondent had shown that appellant was in privity with her Union, the district court expressly found that appellant “fail[ed] to offer any evidence or serious argument . . . to support the proposition that she was not in privity with her Union.” The only argument made by appellant to the district court with regard to privity is in a footnote in her memorandum in opposition to summary judgment that reads, in its entirety:

Arguably, [the element of privity] is not met either since the interest of [appellant] do not necessarily coincide with the Union’s and its interest to enforce the CBA. Therefore, the Union *may* have presented [appellant’s] grievance differently or less vigorously than [appellant] or her counsel have and will continue to do here. *See McDonald v. City of W. Branch*, 104 S. Ct. 1799, 1803 (1984).

(Emphasis added).

But speculation is not enough to avoid summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Appellant therefore did not sufficiently raise the argument regarding privity to the district court. And an appellate court will generally not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because appellant failed to argue the privity issue to the district court, we do not consider it on appeal.

D. Full and fair opportunity to be heard

A party will not be precluded from relitigating an issue under the collateral-estoppel doctrine unless the party had been given a full and fair opportunity to be heard.

Kaiser, 353 N.W.2d at 902. Here, the district court found that appellant “had a full and fair opportunity to be heard on the issues submitted by the parties to the arbitration.”

“In determining whether a party was given a full and fair opportunity to be heard, Minnesota courts focus on two factors. First, we ask whether the administrative hearing provided sufficient procedural safeguards. Second, we ask whether the tribunal or administrative agency was impermissibly biased.” *State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 590 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Sept. 23, 2008). When considering whether sufficient procedural safeguards are imposed, Minnesota courts are consistent with the Restatement (Second) of Judgments, requiring “the right ‘to present evidence and legal argument’ and ‘other procedural elements as may be necessary[,] . . . having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.’” *Id.* (citing Restatement (Second) of Judgments § 83(2) (1980) (discussing collateral estoppel and administrative decisions)).

Here, the record establishes that procedural safeguards were employed. Over the four-day arbitration, appellant—via her Union—was allowed to present evidence and cross examine any witnesses presented by respondent. She therefore was given an opportunity “to present evidence and legal argument,” as required by the Restatement (Second) of Judgments § 83(2). The arbitrator was selected by both parties to ensure neutrality under the CBA, and a stenographic record of the proceedings was made. Finally, when asked by the arbitrator if her Union had “afforded full, fair, and/or

adequate representation throughout the proceeding,” appellant answered in the affirmative. This element of the collateral-estoppel doctrine is therefore met.

We therefore conclude that the district court did not err by applying the collateral-estoppel doctrine here. And because the adoption of the facts that appellant was barred from relitigating entitled respondent to judgment as a matter of law, the district court did not err by granting respondent’s motion for summary judgment as to appellant’s claims arising from those facts.

Affirmed.