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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0108**

Elizabeth R. Johnson,
Appellant,

vs.

Debra M. Spencer,
Special Administrator of
Estate of Francis C. Spencer,
Respondent,

Northland Learning Center
Independent School District #6076,
Respondent.

**Filed December 23, 2008
Affirmed in part, reversed in part, and remanded
Klaphake, Judge**

St. Louis County District Court
File No. 69VI-CV-06-647

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Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Elizabeth R. Johnson challenges the district court's grant of summary judgment to respondents Francis C. Spencer¹ and Northland Learning Center (NLC), on her claims of assault, intentional infliction of emotional distress, and violations of Minn. Stat. § 181.932 (2006) (the Whistleblower Act) against Spencer, and vicarious liability against NLC. Appellant also asserts that the district court erred by denying her request to amend her complaint to include a whistleblower claim against NLC and a claim for punitive damages against both respondents.

Because appellant failed to establish the existence of elements essential to her claims against Spencer and thus also failed to establish that NLC was vicariously liable for his actions, we affirm that part of the district court's order. For the same reason, we affirm the district court's order denying appellant's motion to amend the complaint to include punitive damages. But the district court abused its discretion when it denied appellant's timely motion to amend her complaint to include a whistleblower claim against NLC. We therefore reverse the court's order denying the amendment and remand this matter for further proceedings.

DECISION

The district court must grant summary judgment if, based on the pleadings, discovery, and affidavits submitted, there are no genuine issues of material fact and either

¹ Francis Spencer has died since the district court's order; the special administrator of his estate has been substituted as a party.

party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The district court may not decide factual issues, but must view the evidence in the light most favorable to the nonmoving party. *TCF Bank & Savings, F.A. v. Marshall Truss Sys., Inc.*, 466 N.W.2d 49, 51 (Minn. App. 1991), *review denied* (Minn. Apr. 29, 1991). In order to oppose summary judgment, the nonmoving party must make a sufficient showing to establish the existence of an element essential to the nonmoving party's case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The reviewing court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Assault

In the often-quoted case on civil assault, the Minnesota Supreme Court stated:

An assault is an unlawful threat to do bodily harm to another with present ability to carry the threat into effect. Mere words or threats alone do not constitute an assault. When the words or threats are accompanied by a threat of physical violence under conditions indicating a present ability to carry out the threat, they cease to be mere words or threats.

Dahlin v. Fraser, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939). In *Dahlin*, the supreme court concluded that the evidence was sufficient to support an assault verdict when the defendant uttered threats, clenched his fists, and started toward the plaintiff, who then fainted. *Id.* In other words, a threat must be accompanied by some display of force or action that causes the plaintiff to be in reasonable apprehension of immediate bodily harm. *Waag v. Thomas Pontiac, Inc.*, 930 F. Supp. 393, 408 (D. Minn. 1996). Although the plaintiff in *Waag* was frightened when the defendant said to him, "Come

on. Let's take a ride and I'll show you what life's about[,]” this statement alone was insufficient to withstand a summary judgment motion on plaintiff's claim of assault, absent evidence of defendant's ability to carry out the threat. *Id.*

Here, Spencer sent appellant two notes asking for the return of a handgun that he had lent her. Although appellant was frightened by the notes and the district court concluded that the notes could be interpreted as threatening, there was no imminent threat of bodily harm and, thus, Spencer's actions did not create a prima facie case of assault. The district court did not err by dismissing appellant's claim of assault against Spencer.

Intentional Infliction of Emotional Distress

Appellant's claim of intentional infliction of emotional distress against Spencer is based on the following: (1) Spencer's remarks referring to an incident with appellant's former supervisor and stating that appellant did not want to have those problems again; (2) the search of her work area and computer and the apparent disabling of her phone and computer; (3) Spencer's statement that appellant was “done”; (4) Spencer's statements to other staff, not including appellant, about slander, lawsuits, or employees losing their jobs; and (5) Spencer's two notes to appellant requesting the return of his handgun. The district court concluded that appellant had not made a showing that Spencer's conduct was extreme and outrageous enough to create a prima facie case of intentional infliction of emotional distress.

The supreme court first definitively recognized the independent tort of intentional infliction of emotional distress in *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428 (Minn. 1983). The court held that four distinct elements of proof were necessary: “(1)

the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.” *Id.* at 438-39. The court required a “high threshold standard of proof.” *Id.* at 439. “[E]xtreme and outrageous [conduct] must be so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” *Id.* (quotation and citation omitted). Emotional distress must be so severe “that no reasonable man could be expected to endure it.” *Id.* (quotation and citation omitted). The court emphasized the narrow scope of the cause of action and its antipathy to fictitious and fraudulent claims, and limited the operation of this tort to “cases involving particularly egregious facts.” *Id.*

In a more recent case, the supreme court reiterated the limited nature of the tort and the high standard of proof required. *Langeslag v. KYMN, Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). The court noted that liability for intentional infliction of emotional distress may not be based on “insults, indignities, threats, annoyances, petty oppression, or other trivialities.”” *Id.* at 865 (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). The court reversed the jury’s verdict finding intentional infliction of emotional distress, concluding it was unsupported by sufficient evidence, despite the following facts: (1) the alleged tortfeasor made two false reports to police; (2) the tortfeasor repeatedly threatened the alleged victim with legal action; and (3) the tortfeasor frequently engaged the alleged victim in loud arguments at their workplace. *Id.* The supreme court held that these actions did not constitute extreme and outrageous conduct. *Id.* at 865-68.

In *Lee v. Metro. Airport Comm’n*, 428 N.W.2d 815 (Minn. App. 1988), the district court granted summary judgment, dismissing appellant’s claim of intentional infliction of

emotional distress based on gossip and rumors in the workplace and a delayed promotion. *Id.* at 823. This court concluded that the district court correctly determined that appellant had failed to offer sufficient evidence that the conduct was extreme, outrageous, and intolerable in a civilized community, characterizing it instead as similar to what people encounter in their daily lives. *Id.*

In *Singleton v. Christ the Servant Evangelical Luth. Church*, 541 N.W.2d 606 (Minn. App. 1996), *review denied* (Minn. Mar. 19, 1996), we affirmed the district court's summary judgment in favor of the church on the former pastor's claim of intentional infliction of emotional distress. *Id.* at 614. The pastor claimed that statements about the congregation's intent to remove him as pastor and his job performance, removal from church committees, submission of written statements about his job performance, and meetings held without his knowledge constituted outrageous and extreme conduct. *Id.* at 613. We concluded that none of these actions passed the boundaries of decency or were utterly intolerable in a civilized society. *Id.* at 614.

According to her physician, appellant experienced severe stress, apparently tied to her workplace. But the actions cited by appellant do not meet the high standard set out in *Hubbard* and more recent cases for proof of this claim. Spencer's actions may have been irresponsible, reckless, and inappropriate, but the district court did not err by concluding that they were not extreme or outrageous or beyond the boundaries of civilized conduct.

NLC's Vicarious Liability for Spencer's Torts

Appellant alleged that the NLC was vicariously liable for Spencer's tortious conduct of assault and intentional infliction of emotional distress. An employer is

vicariously liable for the intentional acts of an employee committed within the course and scope of employment. *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). But an employer's liability is predicated on the employee's actions. Because we conclude that appellant has failed to establish a prima facie case against Spencer, there can be no liability on the part of the NLC. The district court did not err by granting summary judgment to the NLC on the issue of vicarious liability.

Whistleblower Claim against Spencer

Appellant alleged a claim under the whistleblower act, Minn. Stat. § 181.932 (2006), against Spencer individually, but not against NLC. The whistleblower act states that an employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee who makes a good faith report of a violation or suspected violation of a federal or state law or rule to the employer or a governmental body or law enforcement official. *Id.*, subd. 1(a).

The district court concluded that appellant pleaded a prima facie whistleblower case, including (1) a report of state law or rule violation that was statutorily reported conduct; (2) an adverse employment action, including the search of her computer and requiring her to sign in and out of NLC; and (3) a causal connection between the two, based on Spencer's admission that he searched appellant's computer because he was angry about the anonymous letter. But the district court further held that Spencer was not an "employer" within the meaning of the statute, citing *Obst v. Microtron, Inc.*, 588 N.W.2d 550, 553-54 (Minn. App. 1999), *aff'd*, 614 N.W.2d 196 (Minn. 2000).

“Employer” is defined as “any person having one or more employees in Minnesota.” Minn. Stat. § 181.931, subd. 3 (2006). In *Obst*, this court held that the definition of “employer” in the statute does not include individual supervisors. 588 N.W.2d at 554.²

In deciding *Obst*, we relied on federal cases analyzing Title VII violations, including *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995), which analyzed a Missouri statute with a definition of “employer” similar to that of Title VII. Appellant correctly states that *Lenhardt* has been disavowed by several courts, both state and federal, predominantly in Missouri. But *Obst* remains good law in Minnesota and the state and Minnesota federal courts continue to cite and rely on *Lenhardt*. See, e.g., *D.W. v. Radisson Plaza Hotel Rochester*, 958 F. Supp. 1368, 1375 (D. Minn. 1997); *Waag*, 930 F. Supp. at 407 (noting lack of unanimity among circuits regarding *Lenhardt*, declining to adopt minority position, and concluding that supervisor cannot be held individually liable as “employer” under Title VII and the Minnesota Human Rights Act).

Under current Minnesota law, a supervisor is not an employer for purposes of the whistleblower act; therefore, the district court did not err by granting summary judgment in favor of Spencer on this issue.

Motion to Amend: Whistleblower Claim against NLC

Appellant moved to amend her complaint to allege a whistleblower claim against NLC, instead of or in addition to a claim against Spencer individually. Appellant’s

² Although the *Obst* case was appealed to the supreme court, this issue was not part of the appeal. See *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000) (*Obst II*).

motion was timely made, occurring before the court-imposed deadline for dispositive and non-dispositive motions. The district court denied her motion to amend because of substantial prejudice to NLC.

Once a responsive pleading has been served, a party may amend a pleading only with leave of the court or by written consent of the other party. Minn. R. Civ. P. 15.01. But the court should “freely” give leave to amend “when justice so requires.” *Id.* The court may base its decision on the extent of prejudice that may result to the party opposing the amendment. *McDonald v. Stonebraker*, 255 N.W.2d 827, 830 (Minn. 1977). The party opposing the amendment has the burden of demonstrating prejudice. *Id.* This court reviews the district court’s decision for an abuse of discretion. *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Prejudice depends to a great degree on the facts and circumstances of the action and at what stage the action is when the request is made. *Id.* at 741. In *Bebo*, the plaintiff made his motion to amend after the defendants’ summary judgment motion had been filed and about two months before trial; in upholding the denial of the motion to amend, the court considered that the amendments added nothing to the complaint and prejudiced the defendant because additional discovery would be needed. *Id.*

On the other hand, in *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001), this court affirmed the district court’s order in permitting the plaintiff to amend her complaint to request binding arbitration four months before the scheduled trial date, because the defendant could not show any

prejudice: it had not completed discovery and would have engaged in the same preparation for trial as it would for arbitration. *Id.* at 820.

Amendments to a complaint can be made after judgment and even after an appeal. *See Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295-96 (Minn. 2003). Amendments after judgment are permitted to enable a plaintiff to collect judgment against the responsible party. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-67, 120 S. Ct. 1579, 1584-85 (2000).

We do not agree with the district court that NLC would be prejudiced by the amendment to the complaint. The sole problem with appellant's whistleblower claim is that she alleged it against Spencer individually, rather than against NLC. An employer can be charged with the actions of an employee, even if the employee cannot be held individually liable under the whistleblower act. *See Obst*, 588 N.W.2d at 554; *see also Obst II*, 614 N.W.2d at 198-200) (discussing plaintiff's whistleblower action against employer, after action against individual supervisor was dismissed). NLC has not shown that it would suffer prejudice if appellant is permitted to amend her complaint because NLC had to prepare to defend the claim of vicarious liability, which was based on the same factual circumstances.

Although this court generally defers to the district court's decision regarding motions to amend, we conclude that the district court abused its discretion by refusing to permit amendment of the complaint. Appellant's motion was brought in a timely fashion, and NLC was the proper party to the whistleblower claim, was involved with discovery throughout the pretrial period, and was prepared to defend itself against a claim of

vicarious liability. We therefore reverse the district court's order denying appellant's motion to amend the complaint to include a whistleblower claim against NLC and remand this matter for further proceedings.

Motion to Amend: Punitive Damages

A party may not include a request for punitive damages in the original complaint but must make a motion to amend the pleadings to include a claim for punitive damages. Minn. Stat. § 549.191 (2006). The party requesting punitive damages must allege that the defendant acted with deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a) (2006). A defendant acts "with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights and safety of others," but nevertheless acts with deliberate disregard or indifference. *Id.*, subd. 1(b). A party can be liable for punitive damages based on the actions of an agent if the principal authorized the agent's acts or disregarded the high probability that the agent was unfit. *Id.*, subd. 2. The court must permit amendment of the pleadings if there is prima facie evidence supporting an award of punitive damages. Minn. Stat. § 549.191.

Based on the record before us, appellant failed to establish a prima facie case to support an award of damages. We therefore affirm the district court's order denying appellant's request to amend her complaint to include punitive damages.

Affirmed in part, reversed in part, and remanded.