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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1112
A09-1813**

Jeanne Zapata,
Appellant (A09-1112),
Respondent (A09-1813),

vs.

Metropolitan Council,
Respondent (A09-1112),
Appellant (A09-1813).

**Filed June 1, 2010
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 27-CV-07-19184

Jill Clark, Jill Clark, P.A., Golden Valley, Minnesota 55427 (for appellant Jeanne Zapata)

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(for respondent Metropolitan Council)

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In these consolidated appeals from judgment following a jury trial on a common-law-assault claim and a court trial with an advisory jury on two claims under the Minnesota Human Rights Act (MHRA), Jeanne Zapata challenges the district court's judgment against her MHRA claims and judgment as a matter of law against that part of the jury's assault verdict that allowed recovery for loss of future earning capacity. The Metropolitan Council challenges the district court's jurisdiction to hear and decide the work-related assault claims and, alternatively, the legal and factual basis for the jury's assault verdict. Because the verdict has an adequate legal and factual basis, and because the district court properly determined its jurisdiction, correctly applied the law to the MHRA claims, and reasonably exercised its discretion, we affirm.

FACTS

Jeanne Zapata was hired by Metropolitan Council's Transportation Division (Met Council) in July 1997 as a bus sweeper and was discharged in December 2006. Zapata challenged her discharge and, after arbitration, was reinstated in August 2007. Several days after her reinstatement, Zapata resigned.

Zapata sued Met Council on September 13, 2007, asserting claims for assault, defamation, and three claims under the MHRA. Met Council moved for summary judgment on all five claims. The district court granted summary judgment on the gender discrimination claim under the MHRA and on that part of the defamation claim relating

to statements about Zapata's family medical leave and a statement made in the course of mediation. These rulings are not at issue in this appeal.

Zapata proceeded to trial without counsel on the remaining claims for assault, defamation, and reprisal and hostile work environment under the MHRA. At the close of Zapata's case-in-chief, Met Council moved for judgment as a matter of law (JMOL) on the four claims. The district court granted the motion on the remaining part of the defamation claim, but denied the motion on the other three claims. Zapata does not appeal JMOL on the defamation claim.

The evidence submitted to the jury on the assault claim related to an incident on September 8, 2006. Zapata claimed that her supervisor, Robert Anderson, had angrily charged toward her, confined her against a wall, and yelled at her. Zapata testified that the confrontation began by Anderson tapping her on the shoulder while she was talking to her sister on the phone. Anderson told her "when you're done I want to talk to you." She said that "he went out the door and he came flying back in the door and he got right in my face." According to her testimony he then "pinned [her] up against the phones" by blocking her exit and told her "I want to talk to you right now. I'm your supervisor." She stated, "He was red as a beet and I was afraid of him." Zapata testified that she then "shimmied out of his way" and walked down the stairs while he continued to follow her, "shouting" and "screaming" at her that he was her supervisor. Zapata left the workplace at 9:00 p.m. and, when she got home, called the internal diversity officer and filed a complaint, alleging harassment and discrimination. Anderson testified that he had a

conversation with Zapata that night but denied that he had tapped her on the shoulder or that he had spoken in an angry voice.

The evidence submitted to the jury in its advisory capacity on the MHRA reprisal and hostile-work-environment claims covered a wider range of employment interaction. Zapata testified that tensions that had existed in her supervisor's interaction with her began to escalate in September 2006 and she believed that she was being unfairly scrutinized—both before and after the September 8 confrontation. Met Council argued that any tension Zapata perceived was a result of her poor performance and inappropriate conduct at work.

Zapata testified at trial that she had not cleaned any buses before she went home on September 8. Anderson testified that he reviewed Zapata's performance again on September 15, about an hour and a half after her shift began, and saw that she had not cleaned any buses. Three days later Anderson told his supervisor, Thomas Humphrey, that he was having performance problems with Zapata. Humphrey instructed Anderson to check the performance of all three cleaners. Anderson testified that he reviewed the work of all of the cleaners at that point and found that one had swept six buses, one had swept eight buses, and Zapata had swept none. Anderson reviewed Zapata's work again one half-hour later and found that she had swept six buses but that half of the buses were unacceptably dirty. He photographed the bus interiors.

That same evening, Humphrey called Zapata into his office to discuss her performance. Humphrey testified that Zapata walked out of his office in the middle of the conversation but returned to his office and spoke insultingly to him. Humphrey

warned her to calm down or she would be written up for insubordination. Humphrey testified that Zapata did not calm down and he sent her home. The next day, Zapata received written warnings for poor performance and insubordination.

Zapata received another written warning for insubordination on November 14, 2006. After Anderson paged her to his office, Zapata walked into a break room adjoining Anderson's office and waited for a co-worker to accompany her to Anderson's office. Seeing Zapata walk past his office and into the break room, Anderson approached her and told her that he wanted to know if she would like to work overtime. Zapata told Anderson that he should page her to tell her to *call* his office, not to tell her to *come* to his office, and asked her co-workers whether they thought Anderson's paging message was appropriate. Anderson testified that Zapata was yelling at him and involving her co-workers. In the findings on the MHRA claims, the district court credited Anderson's testimony about this exchange. Zapata received a final warning and a two-day suspension.

In late November 2006, Zapata saw that a security camera had been positioned to film the outside entrance of the employee restrooms. Believing that this had been done to monitor what times she was taking bathroom breaks, Zapata repositioned the company surveillance camera away from the restrooms. Humphrey testified that the camera had been placed there to investigate an incident of racially discriminatory graffiti in the men's bathroom. When Met Council employees reviewed the footage from the camera they could see that Zapata had moved the camera. Moving the security camera constituted tampering with company property, a violation of provisions in the maintenance-employee

manual. Relying on this violation, Met Council terminated Zapata's employment on December 8, 2006.

Following the union arbitration in July 2007, which determined that the discharge was too severe a sanction for redirecting the security camera, Zapata was reinstated on August 22, 2007. She resigned from her position on August 29, 2007.

In addition to her own testimony at trial, Zapata presented testimony of a co-worker who stated that Zapata was treated differently based on her sex and that he believed women were scrutinized more closely than men at their workplace. Both Zapata and her co-worker testified that Anderson began spending more time in Zapata's workstation in September 2006 and that they believed Anderson did this to harass Zapata. Anderson testified that he spent additional time in the cleaners' workstations in September because he was conducting a study on the work flow and productivity of the entire garage at the direction of Humphrey.

The jury returned a verdict for Zapata on her assault claim that arose from Anderson's confrontation on September 8. It assessed her damages as \$50,000 for past pain, disability, and emotional distress; \$50,000 for past wage loss; \$50,000 for loss of future earning capacity; and no amount for future pain, disability, and emotional distress. In its advisory capacity on Zapata's MHRA claims, the jury determined that Zapata had not been subjected to a hostile work environment but had been subjected to reprisal.

Following trial, but before the district court decided Zapata's MHRA claims, Met Council moved for JMOL on Zapata's assault claim and challenged the factual and legal sufficiency of Zapata's MHRA claims. In its motion for JMOL on the assault claim, Met

Council argued that the district court did not have jurisdiction because the Workers' Compensation Act provides the exclusive remedy for any workplace injury and, alternatively, that Zapata's damage claims were legally and factually insufficient.

The district court determined that it had jurisdiction over Zapata's assault claim and upheld the jury's damages for past wage loss and past pain, disability, and emotional distress but granted JMOL on the allowance of \$50,000 for loss of future earning capacity. The district court also granted judgment against Zapata's claims of reprisal and hostile work environment under the MHRA. Zapata did not file a motion for a new trial but filed an appeal. Met Council also appealed and, by order of consolidation, we address the issues raised in both appeals.

D E C I S I O N

In our analysis of the consolidated issues, we first address Met Council's renewed arguments that the district court lacked jurisdiction over the work-related-assault claim. We then address Met Council's and Zapata's opposing arguments on the legal and factual sufficiency for the assault damages. And, in the last two sections, we address Zapata's challenges to the district court's judgment against her reprisal and hostile-work-environment claims under the MHRA.

I

If an employee suffers a personal injury or death arising out of and in the course of employment, the Workers' Compensation Act (WCA) provides the employee's exclusive remedy and district courts have no jurisdiction. Minn. Stat. § 176.031 (2008); *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 833 (Minn. 1995). Because of the

reciprocal framework that underlies the WCA, if an injury is not compensable under the WCA, district courts retain jurisdiction over the claims.

Workers' compensation cases involving mental injuries have been classified into three categories: (1) mental trauma which results in physical injury, (2) physical trauma which results in mental injury, and (3) mental trauma which results in mental injury. *Egeland v. City of Minneapolis*, 344 N.W.2d 597, 604 (Minn. 1984). "Minnesota denies [workers'] compensation whe[n] mental stimulus produces mental injury." *Johnson v. Paul's Auto & Truck Sales, Inc.*, 409 N.W.2d 506, 508 (Minn. 1987).

Met Council argues that the denials of compensation under the WCA in *Egeland* and *Paul's Auto & Truck Sales* are distinguishable because they involved mental injuries caused by prolonged work-related stress. *Egeland*, 344 N.W.2d at 605; *Paul's Auto & Truck Sales*, 409 N.W.2d at 508. But the Minnesota Workers' Compensation Court of Appeals also has denied compensation for psychological injuries of a worker as a result of digging near an electric cable that was severed by a backhoe. *Larson v. McNamara Contracting & CNA Ins. Co.*, 48 W.C.D. 105 (Minn. Workers' Comp. Ct. App. 1992), *aff'd*, 495 N.W.2d 207 (table) (Minn. 1993). The psychological injuries derived from an isolated event at work, but because the employee sustained no physical injuries, the court concluded that the psychological injuries were noncompensable. *Id.* at 109-110.

Zapata and Anderson agree that Anderson did not physically injure Zapata. Zapata alleged that she suffered emotional distress as the result of their confrontation. Because Zapata experienced mental injuries caused by a mental stimulus, and this type of

injury is not compensable under the WCA in Minnesota, we conclude that the district court had jurisdiction over Zapata's assault claim.

II

Three separate challenges are directed to the common-law assault verdict. Met Council contends that Zapata failed to establish the elements of assault and the district court therefore erred by denying JMOL on the jury's assault determination. Met Council also challenges the sufficiency of the evidence to support the amount of the jury's damages. Zapata raises a third challenge, asserting that the district court erred in granting JMOL against her on the jury's determination of damages for loss of future earning capacity.

The district court's grant of judgment as a matter of law presents a legal question that we review *de novo*. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). JMOL is appropriate when a jury verdict "has no reasonable support in fact or is contrary to law." *Id.* The decision of the district court must be affirmed, however, if, when "considering the evidence in the record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted).

In its first JMOL argument, Met Council maintains that Zapata failed to establish the elements of assault. To establish a claim for assault, the plaintiff must show that the defendant acted with the intent to cause apprehension or fear of immediate harm to, or offensive contact with, the plaintiff; that the defendant had the apparent ability to cause

the harm or offensive contact; and that the plaintiff had a reasonable apprehension or fear that the immediate harm or offensive contact would occur. *See Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980) (defining battery as intentional unpermitted offensive contact with another and assault as fear of immediate battery); 4A *Minnesota Practice*, CIVJIG 60.20 (2006). Words or threats alone do not constitute assault, but evidence that the defendant “exhibited anger [and] used violent language” under circumstances indicating a present ability to carry out threats can be sufficient to show an assault. *Dahlin v. Fraser*, 206 Minn. 476, 478, 288 N.W. 851, 852 (1939).

Zapata testified that she was scared of Anderson when he pinned her between himself and the phones and shouted at her. Assault is not limited to fear of immediate bodily harm but also includes a reasonable fear of immediate offensive contact. Zapata described feeling trapped and being followed and touched by her supervisor while he was visibly extremely angry. Viewed in the light most favorable to the verdict, the evidence reasonably supports the jury’s verdict that Anderson assaulted Zapata.

Met Council’s second argument is directed to the district court’s denial of its JMOL motion that challenged the sufficiency of the evidence to support the jury’s damages calculations. A plaintiff must prove damages by a “fair preponderance of the evidence.” *Pagett v. N. Elec. Supply Co.*, 283 Minn. 228, 236, 167 N.W.2d 58, 64 (1969). This evidence must show the nature and extent of emotional harm caused by an alleged violation. *Bailey v. Runyon*, 220 F.3d 879, 880-81 (8th Cir. 2000). Damages for mental anguish may be based on subjective testimony. *Kohn v. City of Minneapolis Fire Dep’t*, 583 N.W.2d 7, 14 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998). The

mental anguish need not be severe or accompanied by physical injury. *Bradley v. Hubbard Broad. Inc.*, 471 N.W.2d 670, 677 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991). A jury's determination of damages receives deference when it "appear[s] that the damages [] were [not] given under the influence of passion and prejudice." *Kinning v. Sutton*, 300 Minn. 555, 555-56, 220 N.W.2d 485, 486 (1974); *see also Krueger v. Knutson*, 261 Minn. 144, 159, 111 N.W.2d 526, 536 (1961) (determining that district court is in best position to assess adequacy of verdict).

The jury determined that \$50,000 would compensate Zapata for her past pain, disability, and emotional distress and \$50,000 would compensate her past wage loss. Zapata's husband testified that since Met Council attempted to discharge Zapata in December 2006, she spent hours lying in bed and crying and was "out of it." He testified that her experience at Met Council had been hard on the family because "[she's] not feeling very good, [she's] lying in the bed or [she's] crying that day or I have to talk to my daughters because [she] can't." He testified that he had to work extra hours at a second job and do all of the house work because she was not able to do these things. Zapata's co-worker testified that he knew Zapata was scared of Anderson and felt traumatized by him.

Zapata testified that she was earning \$20.00 an hour when she was initially discharged in December 2006 and that she had wanted to quit but could not find a job with comparable pay and benefits. The record indicates that Zapata could regularly work overtime. Zapata's husband testified that Zapata has not been working since December 2006. Zapata testified that when she was reinstated, she was assigned to the third shift in

a different garage, but she had bid on a day shift before she was discharged. Met Council then assigned her back to the original garage on the day shift. When faced with the prospect of returning to the original garage, Zapata stated that she realized she could not go back to that environment again.

Met Council argues that damages for past wage loss can only be calculated from August 2007 until the end of trial because Zapata received backpay before August 2007 as a result of the labor arbitration. The jury determination exceeded by \$6,000 the amount of wages Zapata would have earned working forty hours a week from August 2007 through trial. But the availability of overtime and benefits more than accounts for this \$6,000 excess in the jury's damages determination.

Zapata's husband and her co-worker, in their testimony, described Zapata's emotional distress following the assault. This evidence reasonably supports the jury's damages determination for past pain, disability, and emotional distress. We conclude that the district court did not err in denying Met Council's motion for JMOL on damages for past wage loss and past pain, disability, and emotional distress.

In the third issue relating to damages, Zapata appeals the district court's granting JMOL against that part of the jury's assault verdict that allowed recovery for loss of future earning capacity. The jury determined that Zapata suffered \$50,000 in damages for loss of future earning capacity but that she suffered no damages for future pain, disability, or emotional distress. Damages for loss of future earning capacity must be based on factors that include "the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry." *Wilson v. Sorge*, 256 Minn.

125, 132, 97 N.W.2d 477, 483 (1959). In determining these damages, a jury may “weigh all these elements and, guided by experience and common sense, [] arrive at the proper monetary value of plaintiff’s loss without recourse to his past earnings.” *Id.* But the jury may not “[make] a determination based upon speculation, conjecture, passion, or prejudice.” *Capriotti v. Beck*, 264 Minn. 39, 46, 117 N.W.2d 563, 568 (1962).

The jury assessed no damages for future pain, disability, and emotional distress. Consequently, the basis for Zapata’s loss of future earning capacity is unclear. Zapata was not physically injured or disabled and thus her earning capacity could only be impacted by her emotional injuries, yet the jury apparently found that Zapata failed to prove that she would suffer from these injuries in the future. In the absence of evidence of how Zapata’s future earning capacity was harmed and the extent or duration of that harm, the record provides no basis for loss-of-future-earning-capacity damages. *Cf. Bigelow v. Halloran*, 313 N.W.2d 10, 13 (Minn. 1981) (upholding verdict because appellant produced evidence of her impaired vision and resulting difficulty returning to her former employment); *Mack v. McGrath*, 276 Minn. 419, 421-22, 150 N.W.2d 681, 683-84 (1967) (upholding verdict because appellant demonstrated her permanent disability and jury could infer loss of future earning capacity based on evidence of nature of appellant’s job and jury’s own experiences). We conclude that the district court did not err in granting JMOL against Zapata’s claim of lost future earning capacity caused by the assault and eliminating the jury’s damages amount of \$50,000 for this claim.

III

We now turn to Zapata's MHRA claims. Zapata claimed that Met Council's written warnings and her eventual discharge constituted reprisal for the discrimination complaint she filed with the internal diversity officer. Zapata appeals the district court's judgment against her on her reprisal claim and its use of the jury in an advisory rather than binding capacity for both of Zapata's MHRA claims.

We first address the district court's use of an advisory jury on these claims. Minnesota law requires claims brought under the MHRA to be determined by the district court, not a jury. Minn. Stat. § 363A.33, subd. 6 (2008). The district court is required to make its own findings and was not required to adopt the advisory jury's findings as its own. Minn. R. Civ. P. 52.01; *see also Doan v. Medtronic, Inc.*, 560 N.W.2d 100, 105 (Minn. App. 1997), *review denied* (Minn. May 13, 1997) (stating obligation of district court in MHRA claims). The district court committed no error in using the jury in an advisory capacity; Minnesota law does not allow for a binding jury verdict on an MHRA claim.

The fact findings that we review on the reprisal claim are those of the district court. *See* Minn. R. Civ. P. 52.01 (requiring district court to make factual findings and conclusions of law when jury is advisory). And we review the district court's findings under the clear-error standard. Minn. R. Civ. P. 52.01; *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983). Those findings will be sustained if they are reasonably supported by evidence in the record considered as a whole. *Hubbard*, 330

N.W.2d at 441. Due regard must be given to the district court's opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01.

The MHRA declares that it is an unfair discriminatory practice to intentionally engage in reprisal against any person because that person “(1) opposed a practice forbidden under this chapter or has filed a charge . . . or participated in any manner in an investigation . . . under this chapter.” Minn. Stat. § 363A.15 (2006). The MHRA defines reprisal as “refus[al] to hire the individual; depart[ure] from any customary employment practice; transfer[ring] or assign[ing] the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform[ing] another employer that the individual has engaged in the activities listed in clause (1).” *Id.*

To prevail on a claim of reprisal the employee must satisfy the *McDonnell Douglas* burden-shifting test. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 547 (Minn. 2001). An employee must first establish a prima facie case that the employee engaged in statutorily protected conduct; that the employer took adverse employment action; and a causal connection between the two. *Hubbard*, 330 N.W.2d at 444. These elements must be proved by a preponderance of the evidence. *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986). The burden then shifts to the employer to show legitimate, nondiscriminatory reasons for its actions. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999). If the employer meets this burden, the burden shifts back to the employee to demonstrate that the employer's reasons were actually a pretext for discrimination. *Id.*

The district court concluded that Zapata did not meet her initial burden of establishing a prima facie case of reprisal. The record supports this conclusion. The district court found that Zapata failed to show a causal connection between her protected conduct—filing a discrimination complaint—and the disciplinary actions. A causal connection may be demonstrated “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). Although the disciplinary measures occurred shortly after Zapata filed the complaint, Met Council demonstrated that the disciplinary actions were based on performance and conduct problems, and her discharge was based on the improper action of redirecting the security camera.

Even if Zapata established a prima facie case based on the timing of the disciplinary actions, the district court found that Met Council met its burden to show legitimate, nondiscriminatory reasons for these actions and Zapata failed to show that these reasons were pretextual. The testimony on Zapata’s low productivity and disruptive behavior supports this finding. Thus, the district court’s findings are not clearly erroneous and the record supports its conclusion that Zapata failed to prove her reprisal claim.

IV

Finally, we turn to Zapata’s challenge to the district court’s judgment against her hostile-work-environment claim under the MHRA. On appeal, Zapata argues that the

district court erred in several of its evidentiary rulings preceding the trial. Zapata challenges the district court's exclusion of medical records and witnesses and its determination of the statute-of-limitations period, and she argues that she showed a continuing violation, which should have expanded the timeframe from which she could present evidence. Additionally, Zapata argues that the district court erred in concluding that her hostile-work-environment claim required proof of sexual harassment, rather than proof of harassment that was not sexual in nature but directed at her because she was a female. We first address Zapata's challenges to the district court's evidentiary rulings to determine the proper evidence on which Zapata could rely to establish her hostile-work-environment claim.

Review of evidentiary rulings on appeal is ordinarily proper only if the party submits a posttrial motion to the district court challenging the decisions. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). Although Zapata did not file a motion with the district court, we review the evidentiary rulings in the interest of justice because these rulings affect Zapata's general challenge to the district court's finding against her on her hostile-work-environment claim. *See* Minn. R. Civ. App. P. 103.04 (providing for review of any matter as interests of justice may require).

In its first set of discovery requests, Met Council requested the names of all health-care professionals Zapata had seen in addition to all of her medical records. Zapata initially refused to provide this information. Attorneys for both Met Council and Zapata discussed the issue, but Zapata discharged her attorneys in March 2008 and none of the information was provided by the time discovery closed on April 4, 2008. Witness

lists were due to the court on July 22, 2008. On July 29, 2008, Zapata filed her witness list, including “Plaintiff’s doctors[:] 4 new doctors since 9-08-2006[;] Hospital [s]taff at Regions [s]ince 9-08-2006[;] Medical [d]octor knows of plaintiff’s harassment and hostile work environment since 1997.” On August 23, 2008, Zapata submitted an amended witness list that included the names of five health professionals. Met Council requested medical release forms to obtain Zapata’s records from these witnesses twice after the lists were filed. Zapata did not supply the release forms and Met Council moved for exclusion of the medical witnesses and medical records on the first day of trial, September 9.

One set of records was available for Met Council to review on the first day of trial but Zapata did not have the other records with her. Met Council argued it would be prejudiced by any discussion of medical treatment when it had no opportunity to review the treatment Zapata received before or after the alleged discrimination and assault and no opportunity for an independent medical evaluation to counter expert testimony on the cause of any of Zapata’s injuries. The district court agreed that Met Council would be substantially prejudiced by the inclusion of Zapata’s medical witnesses—disclosed only a few days before trial—and the still-unavailable medical records, and it excluded this evidence. Zapata decided not to use the set of records that were available to Met Council on the first day of trial before the district court ruled on its admissibility.

District courts must be given “discretion to determine the sanction appropriate to a violation of the discovery rules, for they are in the best position to assess the degree of prejudice that will arise from the violation and the efficacy of the remedies available that

may prevent prejudice from resulting.” *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977). A district court abuses its discretion when it imposes sanctions that no reasonable person would agree were appropriate. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). The scheduling order advised Zapata of potential sanctions for failure to comply with the order including “prohibiting the noncompliant party from introducing designated matters in evidence.” In light of this warning, Met Council’s repeated requests for information, and Zapata’s late disclosure of witnesses and records, we conclude that the district court did not abuse its discretion by excluding Zapata’s medical records and witnesses.

The second evidentiary ruling that Zapata challenges is the statute-of-limitations period applied to her hostile-work-environment claim. Again, we review this ruling in the interests of justice. *See* Minn. R. Civ. App. P. 103.04 (stating scope of review).

The district court determined that the one-year statute of limitations in the MHRA precluded Zapata from introducing evidence of events that occurred more than one year before she commenced the action in September 2007. On appeal, Zapata argues that the statute of limitations was tolled when she filed a complaint with the Minnesota Department of Human Rights (MDHR) in November 2006. And she asserts that she should have been able to present evidence from events dating back to November 2005 as a result.

MHRA’s statute of limitations requires that a claim must be filed with MDHR or a civil action commenced in the district court within one year of the occurrence. Minn. Stat. § 363A.28, subd. 3 (2006). If a charge is filed with MDHR, the statute allows the

agency to take up to one year to decide if probable cause exists to pursue the charge. Minn. Stat. § 363A.28, subd. 6 (2006). And the statute allows the employee to initiate a civil action in district court forty-five days after notification from MDHR that it will not be pursuing a charge or forty-five days after MDHR reaffirms a determination of no probable cause. Minn. Stat. § 363A.33, subd. 1 (2006). We agree that these provisions, read together, would toll the statute of limitations for commencing a claim in district court. Consequently, the district court should have determined that the period for admissible evidence extended back to November 2005, not September 2006.

The statute-of-limitations issue, however, is not determinative of Zapata's challenge on appeal. Although the district court likely applied too narrow a statute of limitations, the record shows no evidence that would have been admitted at trial but for this ruling. At trial, Zapata was able to discuss events beginning in April 2006. The other evidence disclosed through Zapata's pretrial witness and exhibit lists related to incidents from November 2004 and earlier, which would not fall into the extended statute of limitations for which she properly argues. The district court excluded evidence of two other incidents at trial because Zapata agreed that they had only been disclosed without names or dates in her complaint and not more fully through discovery responses. Based on our review of the record, including the pretrial disclosures, we conclude that Zapata was able to present all the evidence she properly disclosed in support of her hostile-work-environment claim beginning in November 2005.

Zapata's final challenge to the district court's determination on the scope of admissible evidence is based on her assertion that she demonstrated a continuing

violation, which should have allowed her to introduce evidence of events that took place before November 2005. *See Costilla v. State*, 571 N.W.2d 587, 593 (Minn. App. 1997), *review denied* (Minn. Jan. 28, 1998) (discussing doctrine of continuing violation for MHRA claims). Zapata did not present this argument to the district court and it is not preserved for appellate review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate courts should not review issues not presented and considered by district court). Even if review were proper, Zapata did not present evidence of a hostile work environment, apart from Met Council's legitimate disciplinary actions that occurred after November 2005, as is required to invoke the doctrine of continuing violation. *See Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. App. 1994) (requiring at least one incident of prohibited conduct to occur within statute-of-limitations period to establish discrimination claim as continuing violation).

Separate from Zapata's challenges to the district court's evidentiary rulings, Zapata argues that the district court erred in requiring her to show sexual harassment to prevail on her hostile-work-environment claim. Zapata asserts that she was harassed based on her sex, which created a hostile work environment, and that although the harassment was not sexual in nature, this form of discrimination also is recognized under the MHRA. Met Council argues that discrimination based on a hostile work environment is a type of sexual harassment as defined by Minn. Stat. § 363A.03, subd. 43 (2006), and therefore, to make out a claim of discrimination through a hostile work environment, the employee must show sexual harassment.

The MHRA prohibits employment practices that discriminate based on sex and states that this includes sexual harassment. Minn. Stat. §§ 363A.08, subd. 2(3), .03, subd. 13 (2006). Sexual harassment is defined to include “unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of . . . creating an intimidating, hostile, or offensive employment . . . environment.” Minn. Stat. § 363A.03, subd. 43 (2006). As such, the statute recognizes discrimination through the creation of a hostile work environment in the context of sexually-motivated behavior.

However, the MHRA has been interpreted to prohibit harassment based on disability or race that creates a hostile work environment, without proof of sexual harassment. See *Wenigar v. Johnson*, 712 N.W.2d 190, 205 (Minn. App. 2006) (recognizing claim of hostile work environment based on disability); *Williams v. Metro Waste Control Comm’n*, 781 F. Supp. 1424, 1426 (D. Minn. 1992) (recognizing claim of hostile work environment based on race). *Wenigar* compares the language of the MHRA and Title VII prohibitions in federal law and relies on caselaw that interprets the federal statute to recognize similar claims under the MHRA. 712 N.W.2d at 205-06. We agree that caselaw interpreting Title VII to prohibit the creation of a hostile work environment through harassment based on sex, distinct from sexual harassment, could potentially support the recognition of a similar claim under the MHRA, as Zapata advocates. But we do not decide the question because Zapata failed to establish a prima facie case under either a theory of harassment based on sex or sexual harassment.

To prevail on a claim of discrimination in the form of a hostile work environment a plaintiff must first establish a prima facie case that: (1) she is a member of a protected group; (2) she was subject to harassment; (3) the harassment was based on membership in a protected group, and (4) the harassment affected a term, condition, or privilege of her employment. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 567 (Minn. 2008); *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show legitimate, nondiscriminatory reasons for its actions. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 481 (Minn. App. 2001) (applying *McDonnell Douglas* burden-shifting test to hostile-work-environment claims), *review denied* (Minn. Sept. 11, 2001). If the defendant produces a legitimate reason, the plaintiff must show that the defendant's reasons are pretextual or not worthy of belief. *Sigurdson*, 386 N.W.2d at 720.

The record supports the district court's findings that Zapata did not present evidence of sexual harassment as defined by the statute. Without evidence of sexual harassment, Zapata could not establish the second element of her prima facie case under a sexual-harassment based claim of a hostile work environment.

Even if harassment based on sex, distinct from sexual harassment, were sufficient to support the claim, the district court correctly found that Zapata failed to show that she was harassed on this basis. Zapata's co-worker testified that she was treated differently based on her sex and this was common at their workplace. But Zapata's other evidence centered on her performance evaluations and Anderson's frequent presence in her workstation. Anderson explained this activity and Anderson and Humphrey showed

performance- and conduct-based reasons for the disciplinary actions taken against Zapata and testified that her work was compared to the work of other cleaners. Deferring to the district court's credibility assessments and considering the record as a whole, we conclude that the evidence supports the district court's findings that Zapata failed to establish a causal connection between the actions she claimed constituted harassment and her sex and that she failed to show that the actions were not taken for legitimate, nondiscriminatory reasons. Consequently, the district court did not err in dismissing Zapata's hostile-work-environment claim under the MHRA.

Affirmed.