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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1815**

Theodore Conrad Schotzko,  
Appellant,

vs.

Paramount Granite Company,  
Respondent.

**Filed June 11, 2012  
Reversed  
Ross, Judge**

Wright County District Court  
File No. 86-CV-11-1633

Philip G. Villaume, Jeffrey D. Schiek, Villaume & Schiek, P.A., Bloomington, Minnesota (for appellant)

Cole A. Hickman, Cole A. Hickman, Attorney at Law, Minnetonka, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

Paramount Granite Company terminated Theodore Schotzko's employment after Schotzko repeatedly failed to correct mistakes working as a measure technician. Months later, Schotzko filed a civil complaint in district court alleging that he has hearing and

learning disabilities and that Paramount terminated his employment because of them, violating the Minnesota Human Rights Act. The district court granted summary judgment to Paramount on a lack of evidence of discrimination. On appeal, Schotzko argues that he presented sufficient evidence to avoid summary judgment and, if not, that the district court abused its discretion by not granting a continuance for discovery. Because the district court erred by granting summary judgment, we reverse.

### **FACTS**

The facts underlying summary judgment are as follows. Theodore Schotzko began working for Paramount Granite Company in May 2006. He measured granite for cutting. In January 2008, Schotzko lost hearing in his left ear.

Paramount employees perceived that Schotzko had some difficulty performing his job. Between 2007 and 2010, on various occasions Schotzko failed to review client files before measuring, failed to confirm expectations by obtaining client signatures, and failed to properly measure granite according to customer specifications. Paramount documented each mistake, told Schotzko how to avoid mistakes in the future, and had Schotzko sign a statement to acknowledge each error.

Paramount president Chris Rodgers summarized his decision to terminate Schotzko in a memorandum dated October 12, 2010:

During my conversations with [Schotzko], he was more intent on arguing about policies that were established long ago. He remains very defensive, does not apologize, and certainly does not have the attitude nor performance to improve by learning from mistakes. Everyone here at PGC likes [Schotzko] very much, and this is very difficult for me, but I truly believe [Schotzko] has some sort of learning

disability—he simply does not learn from his mistakes. I do not know if he forgets them or just refuses to change.

The fact that we have had repeated occurrences of [Schotzko's] mistakes, and refusal to follow policy, along with the fact that we don't have much work for him, I have decided to layoff [Schotzko] until further notice.

Paramount terminated Schotzko's employment that same day.

Schotzko initiated this lawsuit on March 21, 2011. His complaint alleges that he had disabilities (based both on his hearing loss and perceived learning disability) that Paramount knew or should have known about, that the disabilities affected his major life activities, and that Paramount terminated his employment because of his disabilities in violation of Minnesota Statutes section 363A.08, subdivision 2 (2010). He also alleges that he met applicable job qualifications and that he performed his job in a manner that met Paramount's expectations.

Paramount filed a motion to dismiss Schotzko's complaint rather than an answer, seeking dismissal under Minnesota Rules of Civil Procedure 12.02(e) or in the alternative summary judgment under rule 56.02, and it moved for sanctions. In support of dismissal, Paramount included affidavits from several Paramount employees. Rodgers submitted an affidavit in which he stated that he had never been aware that Schotzko had a hearing disability. He also stated that Schotzko had lost his job for repeating mistakes and not taking responsibility for them. He added that Schotzko's job no longer exists because Paramount relies on a digital system for measuring. The other employees' affidavits stated that while they were aware that Schotzko had difficulty hearing, they were unaware that he had a disability. They also stated that he failed to review client files

before he measured, made mistakes when he measured, and did not take responsibility for those mistakes.

Schotzko opposed the motion and offered the affidavits of Michael Diehl and Geno Ricci, two former Paramount employees. Both affidavits stated that Schotzko wore clearly visible hearing aids and that everyone at Paramount knew that Schotzko had hearing difficulty. They also stated that during business meetings Schotzko would sit closer to Rodgers so he could hear and that Rodgers knew he was sitting closer for that reason. They stated that Rodgers told them after he had terminated Schotzko that he thought Schotzko had a learning disability. And they believed that Rodgers terminated Schotzko based on a hearing disability or perceived learning disability.

The district court granted Paramount's motion for summary judgment. It first saw no direct evidence of discriminatory intent. Then, applying the traditional burden-shifting test, the district court held that, even assuming that Schotzko is a member of a protected class, he failed to establish a prima facie circumstantial case of discrimination because he is not qualified for the position he was terminated from and he was not replaced by a nonmember of the protected class. The district court added that even if Schotzko had made a prima facie showing, Paramount demonstrated that it had a nondiscriminatory reason for its decision and Schotzko did not present evidence that Paramount's reason was a pretext for disability discrimination.

The district court also denied Schotzko's motion for a continuance to conduct more discovery before summary judgment.

Schotzko appeals.

## DECISION

Schotzko argues that he provided the district court with sufficient evidence to avoid summary judgment. The district court must grant a summary judgment motion when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from the district court’s grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court properly applied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

Schotzko challenges the district court’s determination that he failed to introduce evidence sufficient to show that Paramount engaged in an unfair employment practice under the Minnesota Human Rights Act (MHRA). Under the MHRA, it is an unfair employment practice for an employer, because of a disability, to “discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.” Minn. Stat. § 363A.08, subd. 2(3). A disability under the MHRA is “any condition or characteristic that renders a person a disabled person.” Minn. Stat. § 363A.03, subd. 12 (2010). And a disabled person is “any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.” *Id.*

Schotzko asserts that the affidavits of Michael Diehl and Geno Ricci create a genuine issue of material fact because they state that Paramount terminated him because of his disabilities. Schotzko is correct that each affiant identically asserts, based on unspecified “personal observations,” that “Affiant believes that Rodgers terminated Schotzko based on Schotzko’s hearing disability or perceived learning disability.” We conclude, as did the district court, that these affidavit statements do not constitute direct evidence of discrimination that can prevent summary judgment.

The only kind of affidavit that can introduce a fact meriting consideration against summary judgment is one that is “made on personal knowledge” and that “set[s] forth such facts as would be admissible in evidence.” Minn. R. Civ. P. 56.05. An affiant’s bald assertion that he “believes” an employer had a discriminatory motive when terminating the plaintiff’s employment does not indicate the existence of the requisite personal knowledge to transform the opinion into admissible evidence of the employer’s actual motive. And assuming either affiant actually possesses personal knowledge of Rodgers’s motive based on personal factual observations, this opinion testimony needs factual foundational support to be admissible. *See* Minn. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”); Minn. R. Evid. 701 (“If the witness is not testifying as an expert, the witness’[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’[s] testimony or the determination of a fact in issue.”). The foundationless conclusory statement that each

affiant believes “that Rodgers terminated Schotzko based on Schotzko’s hearing disability or perceived learning disability” is not admissible evidence that the court may rely on to oppose summary judgment.

But Schotzko also introduced and emphasized the Rodgers termination letter, although he did not expressly identify it as direct evidence of discriminatory intent. Plaintiffs alleging employment discrimination may avoid summary judgment on the element of discriminatory intent either by direct evidence or by circumstantial evidence. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Direct evidence of discriminatory intent is evidence that tends to show that the employer intentionally acted on a discriminatory motive. *See Goins v. West Grp.*, 635 N.W.2d 717, 722 (Minn. 2001). A plaintiff provides direct evidence of this element when, for example, a primary decision-maker tells an employee that he no longer has “‘use for a senior editor’ and instead, needed ‘three young editors’ in the news department.” *Kneibert v. Thomson Newspapers, Mich. Inc.*, 129 F.3d 444, 452–53 (8th Cir. 1997). A plaintiff who presents direct evidence of discrimination creates at least a fact dispute avoiding summary judgment against his claims. *See id.* at 453.

Schotzko’s complaint highlights the October 12, 2010 memorandum written by Rodgers and identifies it as evidence that Rodgers discharged Schotzko because of a perceived learning disability. The district court had this memorandum and quoted from it in its summary judgment analysis, but it did not address its quality as direct evidence of discrimination. We cannot avoid noticing the memorandum’s immediate link between the decision-maker’s belief that Schotzko has a learning disability and his decision to

terminate Schotzko's employment. Rodgers's memorandum lists his criticisms of Schotzko and then expressly adds his belief that Schotzko "has some sort of learning disability." The memorandum then gives the reason for this belief, which is that Schotzko "simply does not learn from his mistakes." This is the sort of direct evidence of employer motivation that can prevent summary judgment.

We recognize that Rodgers's "disability" reference might be subject to various interpretations, and that merely describing Schotzko as having "some sort of learning disability" does not necessarily mean that Rodgers actually perceived Schotzko as having a "disability" as defined by the statute. But nothing in the evidence submitted by either party excludes the possibility that Rodgers's use of the term mirrors the statute's definition of it. In light of our duty to view all factual disputes in the light most favorable to the party opposing summary judgment and to make any reasonable inferences against the moving party, in this circumstance, Schotzko's discrimination allegation survives Paramount's summary judgment motion.

It may be that the district court does not discuss the Rodgers memorandum in its analysis of direct evidence of discrimination because Schotzko did not bring it to the court's attention as direct evidence. The district court certainly has no "affirmative obligation to plumb the record in order to find a genuine issue of material fact." *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 260 (8th Cir. 1996). But Schotzko quoted the relevant portion of the memorandum in his complaint, he discussed it in his summary judgment argument for a different point, he provided it to the district court as an exhibit, and the district court quoted the problematic language in it when analyzing Schotzko's summary

judgment motion. We think the memorandum's evidentiary quality as direct evidence of discrimination is so apparent that, in this context, it cannot be ignored in addressing Schotzko's assertion that direct evidence prevents summary judgment. That is, we think that a fact-finder might interpret it as demonstrating Rogers's intention to terminate Schotzko at least in part because of his actual or perceived disability.

Paramount urges that the record contains overwhelming evidence proving that it terminated Schotzko's employment instead because of his mistakes and his failure to adapt to technical and practical requirements of his position. This may be so, but in light of Rodgers's termination memorandum referencing his belief that Schotzko suffers from a disability, resolving the question of Rodgers's actual motive will depend on assessing credibility and weighing evidence—tasks suited for the fact-finder rather than for the court on summary judgment. *See Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 721 (Minn. 1986).

Paramount emphasizes other facts, which the district court found persuasive, tending to show that the new skills needed for Schotzko's position outpaced his qualifications and that Paramount did not replace him with a person who was not a member of Schotzko's alleged class of disabled persons. But these issues bear only on Schotzko's alternative argument, which is that sufficient *circumstantial* evidence prevents summary judgment. Having found *direct* evidence from which a jury could find discrimination, we do not address Schotzko's circumstantial evidence argument.

Schotzko also argues that the district court should have allowed more discovery before deciding Paramount's summary judgment argument. Because the evidence already discovered prevents summary judgment, we do not reach this argument.

**Reversed.**