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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1356**

Maria Jacobson,
Appellant,

vs.

Allina Health Systems, a/k/a Allina Hospitals & Clinics,
d/b/a Allina Professional Services,
Respondent.

**Filed May 26, 2009
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-07-10367

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

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

The district court granted summary judgment in this matter to respondent. Appellant challenges the district court's dismissal of her disability-discrimination claims under the Minnesota Human Rights Act, asserting that the district court erred by concluding that she was not a qualified disabled person as a matter of law and that she failed to raise a genuine issue of material fact regarding pretext. We affirm.

FACTS

Appellant Maria Jacobson commenced employment with respondent Allina Health System in 1995, when Allina acquired the New Ulm Medical Clinic (NUMC). At the time of the acquisition, Jacobson had been employed by NUMC for approximately 20 years in a variety of positions, ultimately focusing on billing related to workers' compensation claims.

In 1988, Jacobson was diagnosed with rheumatoid arthritis. Jacobson has articulated a variety of limitations imposed by her arthritis, including limitations on her abilities to care for herself, sit, stand, perform manual tasks, and drive.

In early 2004, Allina consolidated its billing offices to form Allina Professional Services (APS). Pursuant to the consolidation, Jacobson was required to and did successfully reapply for a position within APS. Jacobson became an APS employee on June 1, 2004, continuing to perform the same job duties that she had performed prior to the consolidation. Although the majority of APS employees worked from an office in St. Anthony, Jacobson was permitted to continue to work at NUMC offices in New Ulm.

As an APS employee, Jacobson became subject to productivity standards that had been in place for Allina's Twin Cities billing employees for approximately three years. The standards were reflected in a written document provided to Jacobson in June 2004. APS provided a four-month training period—one month longer than the training period for brand new employees—at the end of which transitioning employees were expected to meet the productivity standards.

The APS productivity standards required billing employees to average six encounters per hour (EPH) with 95% accuracy. An encounter is a “number that is attached to a date of service for a medical charge or bill.” Although the record is not entirely clear, it appears that multiple actions taken with respect to a single date of service count as only one encounter.

During Jacobson's employment, employees were credited with encounters in two ways. First, they received credit for encounters performed in a computer program called 3rd Millennium, or 3rd MIL. Second, they received credit for hand-logged encounters that were not performed in 3rd MIL, *e.g.*, reviewing and responding to mail correspondence. Transactions reported by 3rd MIL and recorded on employee logs were reviewed by a lead employee who determined how many encounters to credit. An employee's EPH was calculated by taking the total number of hours worked in a month, subtracting time identified by the employee as “nonproductive,” and dividing the remaining number of hours by the total number of credited encounters.

On June 8, 2004, Dawn Heigl, the lead employee for Jacobson's department, visited Jacobson at NUMC to provide training to Jacobson and answer questions related

to APS procedures. In October 2004, Jacobson visited the St. Anthony office for additional training. Jacobson telephoned Heigl and other billing employees when she had additional questions related to specific transactions.

On November 4, 2004, Cindy Nieman, Jacobson's supervisor, travelled to New Ulm and met with Jacobson to review a performance evaluation and coaching document with Jacobson. Jacobson received a performance rating of "Fully successful" (3 on a scale of 5) and received a salary increase, but her performance evaluation did note that "[s]ince Maria's work has started to count for production and accuracy, her accuracy is good . . . [but] her production stats need improvement. She is currently at 3 or 4 encounters per hour and the minimum is 6 encounters with a goal of 8 encounters." The coaching document similarly noted Jacobson's deficiency in EPH. Through the coaching document, Nieman advised that Jacobson needed to spend more time working in 3rd MIL:

Points covered by Manager: Encounters per hour need to be at least 6 I think Maria could achieve a higher number per hour if she gets into her 3rd MIL more. Work Comp standard is set at 4 hours per week in 3rd MIL for both credits and debits. Maria's numbers are lower than normal in this area.

Expectations/Objectives: I expect Maria to increase her encounters per hour To do this I feel she needs to get into 3rd MIL more. Maria needs to set aside 4 hours a week for debits and 4 hours a week for credits for both work comp and Occ. Med.

Jacobson separately signed the performance evaluation and the coaching document but testified that she did not understand the significance of the coaching at the time.

On January 10, 2005, Nieman took the next step in Allina's disciplinary procedure, issuing a verbal warning to Jacobson. This warning reiterated that the "minimum production expectation for the Work Comp/Occ Med department is not being met," specifying Jacobson's EPH as 3 for October and November, and 4 for December. Nieman also noted that "3rd MIL [was] not being worked as previously discussed." The written conference form set forth Nieman's expectation that Jacobson would "increase her encounters per hour to at least the minimum of 6 encounters per hour without sacrificing accuracy" and that "3rd MIL should be worked 4 hours a week for debits and 4 hours a week for credits at the minimum." Jacobson signed the written conference form, adding her written comment: "I am working with Cindy Nieman on solving the problems with my production numbers."

Jacobson believes that 3rd MIL was not properly tracking the encounters that she was performing but has been unable to substantiate this belief. At her deposition, Jacobson testified that "[because of] the amount of work I was doing and logging compared to what they were coming up with, these low numbers, and the amount of time I was in 3rd MIL working I, I know I was producing. I just know." Jacobson concedes that the 3rd MIL software was a network application and that she was the only remote worker having problems.

On January 14, 2005, Nieman sent an email to Jacobson in which she advised her of the seriousness of the performance issues and suggested that Jacobson do two things. First, hand-log all of her work, including work in 3rd MIL, so that Nieman could ensure that she was receiving proper credit. Second, visit St. Anthony for a day or two to sit in

the department there and work: “Dawn or I can sit with you and see what you are doing differently from the reps up here. We can then give you some suggestions and ideas on how to get through work and getting into and resolving encounters in 3rd MIL. Additional 3rd MIL training might be a good idea too.”

Also in mid-January, Jacobson participated in a telephone conference with Nieman and department manager Kristine Kapisak, to whom both Jacobson and Nieman reported. Jacobson advised Nieman and Kapisak that she did not believe that 3rd MIL was accurately tracking her encounters. Because 3rd MIL was a network application that no one else was having problems with, Nieman believed that Jacobson’s problem with receiving credit for encounters stemmed from her failure to document non-3rd MIL encounters. Kapisak and Nieman also learned that Jacobson had been assisting NUMC employees by pulling medical records—a task that was not part of her job responsibilities as an APS employee. Kapisak communicated to NUMC that Jacobson should not be performing those duties.

On February 2, 2005, Kapisak and Nieman took the next step in Allina’s disciplinary procedure, issuing a written warning. The written warning indicated that production standards were still not being met (4 EPH for January) and indicated:

Maria has received a coaching on 11/04/2004, a verbal warning on 1/10/2005 and now the written warning. Maria is aware of the expectations for quality and productivity and has been given a copy of these expectations. The lead in our area has worked with Maria weekly to help her become successful. It has been suggested Maria come up to our office to get additional training on Occ Med and APS procedures.

I expect Maria to increase her encounters per hour and keep her accuracy at a high standard. I expect Maria to be in 3rd MIL the majority of her day resolving outstanding issues with Occ Med and Work Comp accounts. I will give an update on progress in two weeks.

Nieman and Kapisak reviewed the written warning with Jacobson by telephone. Kapisak advised Jacobson that she could be terminated if she did not bring up her productivity numbers by the end of the month. Jacobson signed the written warning document and commented: “Need additional help with: occ-med, RIV, and other APS procedures regarding what is considered finished and complete in 3rd MIL, what is considered an R—how much time to spend on encounters.”

Jacobson testified that she advised Nieman by email in January and Nieman and Kapisak by telephone in February that she was unable to drive herself to St. Anthony for additional training because of her arthritis. Nieman and Kapisak denied Jacobson’s request that the training take place in New Ulm, and they suggested that Jacobson arrange to carpool when another NUMC employee was making the trip. Jacobson arranged for a ride to St. Anthony on February 17. But on that day, Jacobson had a flare-up in her arthritis and was unable to report to work or travel to St. Anthony. The training was not rescheduled.

On March 4, 2005, Nieman and Kapisak traveled to New Ulm to advise Jacobson that her employment was being terminated. Jacobson advised Nieman and Kapisak that her arthritis was affecting her productivity rates. Both Nieman and Kapisak testified that this was the first that they learned of Jacobson’s arthritis. When Jacobson asked whether lower productivity standards could be set for her, Kapisak replied that Jacobson wasn’t

even meeting the minimum standard. Jacobson signed the notice of termination, and commented that “I feel that my production levels are lower because of rheumatoid arthritis symptoms and that my work duties aggravate my arthritis.”

Jacobson filed a disability-discrimination charge with the Minnesota Department of Human Rights; following the department’s notice of dismissal, Jacobson commenced this action, asserting disability discrimination, failure to accommodate, and reprisal in violation of the Minnesota Human Rights Act (MHRA). The district court granted Allina’s motion for summary judgment on all bases.

Jacobson appeals the dismissal of her disability-discrimination and failure-to-accommodate claims.

D E C I S I O N

This court considers two questions on appeal from summary judgment: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in applying 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 the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “When a motion for summary judgment is made and supported, the nonmoving party must ‘present specific facts showing that there is a genuine issue for trial.’” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citing Minn. R. Civ. P. 56.05). “Mere averments are not sufficient to survive summary judgment.” *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 63 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving

party's case, the nonmoving party must make a showing sufficient to establish that essential element.” *DHL*, 566 N.W.2d at 71 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986)).

Disability-discrimination claims under the MHRRA are analyzed under the shifting-burden analysis articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Under that analysis, a plaintiff alleging discriminatory discharge must first demonstrate a prima facie case by showing that (1) she is a member of a protected class; (2) she was qualified for the position from which she was discharged; and (3) she was replaced by a non-member of the protected class. *Id.* If the plaintiff meets that burden, the burden of production shifts to the defendant, who must put forth evidence of a legitimate, nondiscriminatory reason for the discharge. *Id.* If the defendant meets that burden, the presumption of discrimination created by the prima facie case disappears, and the plaintiff has the burden of demonstrating that the reasons for discharge articulated by the defendant are a “pretext for discrimination.” *Id.*

A plaintiff alleging an employer's failure to accommodate must prove three elements: (1) that she is a qualified disabled person; (2) that the employer knew of her disability; and (3) that the employer failed to make reasonable accommodation of her known disability. Minn. Stat. § 363A.08, subd. 6 (2008); *Hoover*, 632 N.W.2d at 547.

The district court dismissed both the discriminatory-discharge and failure-to-accommodate claims based on its conclusions that Jacobson is not a qualified disabled

person as a matter of law and, alternatively, with respect to the discriminatory-discharge claim, that Jacobson cannot show pretext as a matter of law. We affirm on both grounds.

Qualified Disabled Person

A qualified disabled person is “a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question.” Minn. Stat. § 363A.03, subd. 36 (2008). Productivity requirements have been held to be essential functions. *See Milton v. Scrivner*, 53 F.3d 1118, 1124-25 (10th Cir. 1995) (holding that plaintiffs were not qualified because they admitted that they could not meet uniformly applied production standards); *Denczak v. Ford Motor Co.*, 407 F. Supp. 880, 886 (N.D. Ohio 2005), *aff’d* (6th Cir. Feb. 1, 2007) (same); *Beaver v. Delta Air Lines, Inc.*, 43 F. Supp. 2d 685, 694 (N.D. Tex. 1999) (same). Moreover, lowering productivity standards has been held not to be a reasonable accommodation. *See Milton*, 53 F.3d at 1124 (holding that lowering production standard was not reasonable accommodation).

Allina focuses on several instances in which Jacobson stated that she could not work as fast as Allina required because of her arthritis. Jacobson argues that her statements were taken out of context, citing her own testimony that her actual productivity was not the problem, but rather that it was her inability to get credit for her work because her arthritis precluded her from traveling to St. Anthony to get additional training. Jacobson thus asserts that she is a qualified disabled person because she could

have performed her job duties if Allina had provided her with the accommodations of (1) training in New Ulm or (2) additional time to complete training in St. Anthony.¹

We conclude that Jacobson has not raised a genuine issue of material fact with regard to whether she is a qualified disabled person. It is undisputed that Jacobson was unable to achieve the average EPH required by Allina. And there is no evidence that additional training—whether in New Ulm or St. Anthony—would have allowed Jacobson to meet Allina’s EPH requirement and thus rendered her a qualified employee. Jacobson had already attended training sessions both in New Ulm and St. Anthony, and she had continual access to Nieman, Heigl, and others by phone to ask questions. All told, Jacobson had approximately nine months in which to learn to properly perform her work so that it would be credited. Because there is no evidence that additional training would have allowed Jacobson to meet Allina’s productivity requirements, we agree with the district court that she is not a qualified disabled person as a matter of law.

Pretext

The Minnesota Supreme Court has made clear that “in order to avoid summary judgment under the *McDonnell Douglas* third step, the employment discrimination plaintiff must put forth sufficient evidence for the trier of fact to infer that the employer’s proffered legitimate nondiscriminatory reason is not only pretext but that it is pretext *for*

¹ Jacobson also claims that fixing 3rd MIL would have been a reasonable accommodation. We agree with the district court that Jacobson has not presented sufficient evidence to prove that 3rd MIL, a network-based program with which no other employee experienced problems, was working improperly.

discrimination.” Hoover, 632 N.W.2d at 546 (emphasis added). The nature of evidence sufficient to meet this burden may vary:

In some cases, sufficient evidence may consist of only the plaintiff’s prima facie case plus evidence that the employer’s proffered reason for its action is untrue. In other cases, more may be required. However, at all times the employment discrimination plaintiff retains the burden of establishing that the defendant’s conduct was based on unlawful discrimination.

Id.

The district court concluded that Jacobson had not met her burden to demonstrate pretext, emphasizing that she had not identified any nondisabled employee who was treated more favorably. Jacobson argues that the identification of such employees is not required in order to find pretext. But such evidence is relevant to a pretext analysis, and we agree with the district court’s conclusion that Jacobson did not put forth sufficient evidence to create a genuine issue of material fact with respect to whether Allina’s articulated reason for her termination was a pretext for disability discrimination. *See Hoover, 632 N.W.2d at 547 (holding that the fact that appellant was only employee disciplined for compliance issues supported a finding of pretext); Lindgren v. Harmon Glass Co., 489 N.W.2d 804, 809 (Minn. App. 1992) (finding no pretext as a matter of law because there was no evidence of undisclosed motive or biased treatment), review denied (Minn. Oct. 20, 1992).*

Jacobson asserts that she met her burden to show pretext by demonstrating that the articulated reason for her termination was false, relying on her own conclusory assertions that she was meeting production standards but was not being properly credited for them

and that Allina knew that she was not being properly credited. But Jacobson's job responsibilities included not just properly performing encounters, but taking the necessary steps to document her completion of—and thus receive credit for—those encounters. Moreover, Allina has not conceded that its productivity reports (including the 3rd MIL report) were inaccurate. Rather, Jacobson's supervisor and manager acknowledged that Jacobson *believed* this to be the case. Nor is Jacobson's reliance on a single daily report purportedly showing 91 encounters sufficient to create a genuine fact issue given Allina's business records reflecting Jacobson's ongoing failure to meet productivity standards.

Even assuming that Allina's asserted reason for discharge was untrue, it is not clear that Jacobson can meet her burden to show pretext *for discrimination*. There is no evidence of differential treatment in this case or even biased remarks. If there were undisclosed reasons for Jacobson's discharge, it seems likely that they are nondiscriminatory reasons, *e.g.*, that Allina did not wish to continue the remote employee relationship or did not wish to continue investing training resources when Jacobson appeared unable to learn APS procedures. Thus, this seems to be a case in which the falsity of the employer's reasons for discharge, even if proven, would not meet the burden to show a pretext *for discrimination*. *Hoover*, 632 N.W.2d at 546 (noting that employer does not meet burden "if the record conclusively revealed some other, nondiscriminatory reason . . . or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred" (quotation omitted)).

Neither are we persuaded by Jacobson's assertions that pretext is evidenced by (1) a discussion between APS director Barbara Ball and NUMC manager Massey about finding Jacobson another job within NUMC; (2) Allina's failure to provide her with additional training in New Ulm or allow additional time for completion of training in St. Anthony; or (3) Kapisak's deposition testimony that, while a temporary accommodation may have been available, if Jacobson's arthritis prevented her from being able to perform her duties, she would not have been fit for the job. None of these facts is probative of falsity of the articulated reasons for discharge or bias on the part of Allina decisionmakers.

Affirmed.