STATE OF MINNESOTA
IN COURT OF APPEALS
A10-437

Lou Vang Thao,
Appellant,

vs.

Avtec Finishing Systems, Inc.,
Respondent.

Filed September 28, 2010
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 27-CV-09-2940

Chue Vue, United Legal Associates, LLC, St. Paul, Minnesota (for appellant)

Christopher J. Harristhal, Julia H. Halbach, Larkin Hoffman Daly & Lindgren, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Collins, 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.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appellant Lou Vang Thao challenges the summary judgment on her employment discrimination claim granted to her former employer, respondent Avtec Finishing Systems, Inc. (Avtec). Because Thao has raised no genuine issue of material fact as to whether Avtec's reason for Thao's discharge was a pretext for discrimination, we affirm.

FACTS

Avtec hired Thao in January 1999 as a racker assigned to the company's anodize department to work at the "small parts table." Thao was responsible for simple, repetitive work, requiring minimal English and low supervision. Most of the production of the small-parts table was ordered by one Avtec customer, Northwest Swiss-Matic (Swiss-Matic). By late 2005, Avtec customers' quality demands made it impractical to employ non-English speakers other than at the small-parts table. Thus, Thao, who speaks little English, was thereafter limited to work at this workstation, where her performance was adequate. Swiss-Matic orders decreased throughout 2007: Avtec's monthly sales to Swiss-Matic for May through December fell by approximately 50% from the levels of monthly sales during the first four months of the year.

By April 2007, employing full-time rackers at the small-parts table during Thao's shift was no longer practical, and she was laid off. Avtec then assigned the occasional part-time work at the small-parts table to any available workers, including two younger Hispanic women, Aileen Castillo and Hilda Condo, neither of whom ever worked full-time at this workstation.

Thao sued Avtec for employment discrimination, claiming that she was discharged because Avtec does not like elderly Hmong women and that she was replaced by two younger Hispanic women. Avtec responded that Thao was necessarily discharged as part of a reduction in workforce motivated by legitimate business considerations and that she was not replaced.

Avtec moved for summary judgment, which the district court granted after determining that (1) Thao presented evidence sufficient for a prima facie case of discriminatory discharge, (2) Avtec raised a non-discriminatory reason for Thao's discharge, and (3) Thao failed to present evidence to show that Avtec's reason was a pretext for discrimination. This appeal followed.

D E C I S I O N

"[Summary j]udgment shall be rendered forthwith if 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 a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal, this court reviews summary judgment by asking: (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).

To establish a prima facie case of discriminatory discharge, Thao must establish "(1) [s]he is a member of a protected class; (2) [s]he was qualified for the job from which [s]he was discharged; (3) [s]he was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work." *Hubbard v. United Press Int'l,*

Inc., 330 N.W.2d 428, 442 (Minn. 1983) (using a modified version of the framework for a prima facie case in employment discrimination disputes set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). After the employee demonstrates a prima facie case, the employer must raise a legitimate, nondiscriminary reason for the discharge. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. If the employer establishes such a reason, the burden reverts to the employee to prove, by a preponderance of the evidence, that the employer's nondiscriminatory reason is in fact a pretext for discrimination against the employee. *Id.* at 804, 93 S. Ct. at 1825; *Hubbard*, 330 N.W.2d at 442 n.12.

Thao challenges the district court's determination regarding pretext for discrimination, contending that several unresolved genuine issues of material fact preclude summary judgment. We disagree. Thao first argues that there is a genuine issue of material fact regarding her performance. We note that factors including the importance of the paperwork at the small-parts table, whether Thao had to take the English and mathematics tests required of rackers in 2002, and whether Thao copied a coworker's worksheet are irrelevant because Thao was not discharged based on her performance or her test results. Thao next argues that there was no official documentation of her English-language limitation. Avtec agrees that Thao's English-language limitation was never formally documented because there was no place to address language proficiency issues on performance reviews. Such lack of documentation creates no genuine issue of material fact. Finally, Thao contests Avtec's assertion that she was never treated improperly because of her race or age. But in support

thereof, Thao relies solely on her bare contention that she was discharged because she is Hmong, which is refuted by Avtec's nondiscriminatory reason for Thao's discharge.

Thao argues that the nondiscriminatory reason advanced by Avtec was a pretext for discrimination. An employee may show a pretext for discrimination directly, by providing evidence of a motive of discrimination, or indirectly, by establishing that the basis for the discharge was not credible. *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 153 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). However, "[discharging] an employee to reduce costs under a valid [reduction-in-force] plan is a legitimate employment action." *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 883 (Minn. App. 1988).

Thao argues that Avtec's discharge of two older female Hmong employees, supports her claim of discrimination; but, as part of the same workforce reduction, Avtec also discharged two white male employees. Thao argues that she had moved effectively among different workstations; but Avtec has shown that Thao was moved only as an alternative to early dismissal when work at the small-parts table was slow and that her English-language limitation made it impossible to utilize her at any other workstation on a regular basis. Finally, Thao challenges Avtec's claim that its reduction in workforce was due to a reduction in the sales of small-parts-table products, because Avtec hired younger, Hispanic women to replace her and the other discharged Hmong woman; but, in a deposition, Castillo testified that, although there is occasionally assigned work at the small-parts table, she has not worked full-time at this workstation following Thao's discharge.

Thao also asserts that Avtec's reduction in workforce was pretextual in light of Avtec giving fifty-cent hourly raises to Castillo and Condo three months after Thao's discharge; but the cost of granting modest hourly wage increases to two employees pales in comparison to the savings Avtec derived from eliminating four positions. Finally, Thao claims that the reduction in workforce was pretextual because Avtec hired more rackers within five months of the reduction in workforce; but the new rackers were assigned to workstations other than the small-parts table and hiring of workers for positions for which Thao was not qualified is simply irrelevant to her discharge. As was determined by the district court, we agree that Thao failed to present evidence sufficient to raise a genuine issue of material fact as to whether Avtec's reduction of its workforce was a pretext for discrimination.

Affirmed.