STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0926

Amy J. Biffert,
Appellant,

vs.

Nick DeVries State Farm Insurance,
Respondent.

Filed January 28, 2013
Affirmed
Cleary, Judge

Dakota County District Court
File No. 19HA-CV-11-5374

Sonja Dunnwald Peterson, Dunnwald & Peterson, P.A., Minneapolis, Minnesota (for appellant)

Kurt J. Erickson, Carrie L. Zochert, Jackson Lewis LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

CLEARY, Judge

In this appeal from summary judgment dismissing her claims under the Minnesota Whistleblower Act (MWA), Minn. Stat. § 181.932 (2010), appellant/cross-respondent Amy Biffert argues that the district court abused its discretion when it denied her motion

to amend admissions and granted summary judgment in favor of respondent/cross-appellant Nick DeVries State Farm Insurance (agency). The agency challenges the district court's finding that Biffert's summons was sufficient to provide personal jurisdiction over it. Because Biffert's summons substantially complied with the rules of civil procedure, and because the district court did not abuse its discretion or otherwise err by concluding that amendment of Biffert's admissions would not advance presentation of the merits of her MWA claim, of which she failed to establish an essential element, we affirm.

FACTS

Biffert began work at the agency in July 2010 as a full-time customer service associate. Initially, she was paid a salary of $30,000 per year by twice-monthly direct deposit, and she was told that she could access her earning statements electronically online.

In March 2011, agency owner Nick DeVries informed Biffert that her position was changing from salaried to hourly, effective April 1, 2011. At that time, Biffert told Nick DeVries that she had been unable to log into the online system to retrieve her statements and that she wanted to do so now that she would be paid on an hourly basis. DeVries said that he would look into the issue. Biffert asserts that the issue was not resolved and that she did not receive her statements even though she submitted repeated requests to DeVries. On April 1, 2011, Biffert called the Minnesota Department of Labor and Industry (DOLI) and spoke with senior labor investigator John Stiffin. Stiffin informed

Biffert that employers were required to provide their employees with written statements of earnings upon employee request and that he would inform DeVries of this law.

Approximately one week after Biffert spoke with Stiffin, DeVries received a letter from DOLI stating that his employment practices might be in violation of Minn. Stat. § 181.032 (2010) (requiring employers to provide earnings statements to employees). Biffert alleges that DeVries began subjecting her to unwarranted criticism about her work performance after she first started requesting statements and that his criticism of her became more intense after he received the DOLI letter. Biffert also alleges that her work performance was always acceptable or better. Approximately two weeks after DeVries received the DOLI letter, he informed Biffert that she was being demoted to a part-time receptionist position, effective the following Monday. On the day Biffert was to begin her reclassified position, April 25, 2011, the agency terminated her employment.

On August 30, 2011, Biffert served the agency with a summons and complaint alleging a retaliatory firing in violation of the MWA and violation of the Minnesota Personnel Record Review and Access Act (MPRRAA). The agency submitted a motion to dismiss and served Biffert with its memorandum of law in support of its motion. The memorandum asserted (1) insufficient process, insufficient service of process, and lack of personal jurisdiction; (2) failure to state a claim under Minn. R. Civ. P. 12.02(e); and (3) that summary judgment was proper under rule 56 because there was no genuine issue of material fact regarding the number of employees at the agency and the agency was therefore not an "employer" under the MPRRAA. Biffert amended her complaint to withdraw the MPRRAA claim, but she maintained the MWA claim. On December 5,

2011, the agency served Biffert with its answer to her amended complaint in which it raised affirmative defenses, including failure to state a claim upon which relief can be granted and insufficient process.

Ten days later, the agency served interrogatories, requests for production of documents, requests for admissions, and a deposition notice. Biffert timely responded to the interrogatories and document requests, but she failed to respond to the agency's requests for admissions, including admission No. 26, which asked Biffert to admit that the agency was entitled to dismissal of her amended complaint with prejudice and on the merits. If a party fails to timely respond to a request for admissions, the request is deemed admitted. Minn. R. Civ. P. 36.01. Once Biffert's failure to respond to the request for admissions was brought to her attorney's attention, she moved to amend the admissions, arguing that failure to respond was due to a mistake by her paralegal and the fact that she did not notice that requests for admissions had been served with the other discovery requests. A hearing on the motion was set for February 23, 2012.

On February 10, 2012, the agency served an opposition to Biffert's motion to amend. The agency argued that the admissions amendment should not be allowed because the oversight was inexcusable, and it would not promote presentation of the merits of Biffert's claim because she could not establish that she made a "report" under the MWA. The agency argued that, even if the district court allowed Biffert to amend her admissions, it was still entitled to dismissal for failure to state an actionable claim under the MWA and for lack of personal jurisdiction due to a defective summons.

At the hearing on her motion to amend, Biffert argued to the district court that her MWA claim was meritorious and that allowing the admissions amendment would not prejudice the agency. Biffert explained that the need for the amendment was created by her counsel's oversight and argued that, because her MWA claim was meritorious, dismissal on the pleadings or summary judgment was inappropriate at this point in the litigation. The agency argued that the merits of Biffert's claim were at issue and ripe for dismissal because of admission No. 26 and the meritless nature of her claim.

The district court issued its memorandum and order on March 26, 2012. Judgment was entered one month later, on April 26, 2012. The district court denied Biffert's motion to amend her admissions, finding that amendment would not serve presentation of the merits of her claim because, even if she did amend the admissions, she still could not prove an essential element of her MWA claim. The district court did not address whether Biffert's failure to timely answer the admissions was due to excusable neglect and granted the agency's motion to dismiss.

Biffert appealed, and the agency filed a notice of related appeal.

D E C I S I O N

I

The agency challenges the district court's conclusion that it had personal jurisdiction over the agency. This court reviews legal issues concerning jurisdiction de novo. *McLain v. McLain*, 569 N.W.2d 219, 222 (Minn. App. 1997), *review denied* (Minn. Nov. 18, 1997). The purpose of a summons is to notify a defendant that an action against him has been commenced and that judgment will be taken against him if he fails

to answer. *Hass v. Branvold*, 418 N.W.2d 511, 513 (Minn. App. 1988). Under Minn. R. Civ. P. 4.01, a summons must include the name of the court and the parties, subscription by the plaintiff or the plaintiff's attorney, provision of an address for service, provision of the time within which the defendant must answer, and notification to the defendant that default will occur if the defendant fails to answer. As long as the purpose of the summons is fulfilled, and there is substantial compliance with the rules, the summons is sufficient. *Hass*, 418 N.W.2d at 513.

The agency argues that the new summons Form 1, provided in 2010 by the Minnesota Supreme Court, is mandatory and that Biffert's failure use the form resulted in insufficient process. We disagree. Sample forms provided in the appendix of forms to the rules of civil procedure are not mandatory, and instead exist to "sufficiently *reflect* the rules" and "to *indicate*" what the rules contemplate. Minn. R. Civ. P. 84 (emphasis added). Biffert's summons substantially complied with the rules. The summons stated the name of the court and the parties, informed the agency of the time within which it must serve an answer, was subscribed by Biffert's attorney, and included the attorney's address for service of process. The summons informed the agency that failure to answer would result in judgment against it. The purpose of a summons was fulfilled.

II

Biffert appeals from the district court's denial of her motion to amend her admissions. Whether to permit an amendment to admissions rests within the district court's discretion. *Dahle v. Aetna Cas. & Sur. Ins. Co.*, 352 N.W.2d 397, 402 (Minn. 1984). A district court "may permit" an amendment to admissions "when the

presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Minn. R. Civ. P. 36.02.

Biffert does not specifically argue that the district court abused its discretion by denying her motion to amend. Instead, she argues that she did establish a prima facie claim under the MWA and that allowing amendment to the admissions would therefore help promote presentation of the merits of her claim. The agency, in turn, argues that summary judgment was proper because Biffert did not establish a prima facie claim under the MWA and that therefore the denial of Biffert's motion to amend was not an abuse of discretion. Because the parties' arguments about the admissions and the merits of the underlying claim are intertwined, our analysis of whether the district court abused its discretion by denying Biffert's motion to amend will turn, in large part, on the merits of Biffert's claim.

The MWA prohibits an employer from firing or otherwise retaliating against an employee when that employee "in good faith, reports a violation or suspected violation of any federal or state law or rule . . . to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1). To establish a prima facie case of retaliatory discharge under the MWA, the employee must show "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001).

The making of a good-faith report is statutorily protected conduct that satisfies the first element of a prima facie case under the MWA. *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005). Whether a report was made in good faith is a question of fact, but a court may determine as a matter of law that certain conduct does not constitute a report for purposes of the MWA. *Cokley*, 623 N.W.2d at 630.

To satisfy the good-faith report requirement, "the report that is claimed to constitute whistle-blowing" must be "made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn. 2010) (quotations omitted). An employee's purpose in making the report must be considered in addition to the content of the report. *Id*. "The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose an illegality." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). To constitute a good-faith report, the whistleblower must "blow the whistle" for the "protection of the general public or, at the least, some third person or persons" in addition to the whistleblower. *Kidwell*, 784 N.W.2d at 227 (quoting *Obst*, 614 N.W.2d at 200 (quotation omitted)).

The district court concluded that Biffert "failed to adduce facts sufficient to establish she made a report of a violation or suspected violation of the law by [the agency]" because, in part, "[n]owhere in [Biffert's] pleadings [did] she reference any third party that might benefit from her 'report.'" Biffert argues that the district court misapplied the law and asserts that, the Minnesota Supreme Court has interpreted the MWA statute to *not* include a public-policy requirement, and that a good-faith report

under the MWA therefore need not have been made for the protection of someone other than the whistleblower. We disagree.

In 2002, the Minnesota Supreme Court rejected the "importation of a public policy requirement into the whistleblower statute," and clarified that employees are not required to prove that the law their employer was allegedly violating implicated public policy. *See Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002) (rejecting an interpretation of the MWA which imported a public-policy requirement into the act's statutory language). Before *Anderson-Johanningmeier*, plaintiff-employees were often required to show that the law allegedly violated was "designed to promote the public's morals, health, safety and welfare." *Id*. at 274–75 (quotation omitted). At the same time it held that the MWA contained no public-policy requirement, the *Anderson-Johanningmeier* court rejected the argument that, without the public-policy requirement in place, a whistleblower lawsuit could occur every time an employee was terminated. 637 N.W.2d at 277. The court predicted that such a flood of claims would not occur because the good-faith requirement within the MWA "serves to limit the nature of actionable claims." *Id*. (citing *Obst*, 614 N.W.2d at 202).

In 2010, the Minnesota Supreme Court revisited the MWA's good-faith report requirement and reiterated that a good-faith report under the act "protects the conduct of a neutral party who blows the whistle for the protection of the general public or, at the least, some third person or persons in addition to" the whistleblower. *Kidwell*, 784 N.W.2d at 227 (quoting *Obst*, 614 N.W.2d at 200 (quotation omitted)). The court went on to say that, "[a]s we noted in *Obst*, the purpose behind our [whistleblower] statute, as

evidenced by the requirement of 'good faith,' is to protect disclosures made by neutral parties who report violations of the law for the public good." *Id*. at 228. The court noted that this was the same conclusion it reached in *Anderson-Johanningmeier*, thereby differentiating between the former requirement that a plaintiff-employee show the violated law implicates public policy and the still-applicable requirement that a good-faith report be made for the purpose of protecting someone in addition to the reporter. *See id*.

Biffert's argument errs in its assertion that the district court held that her complaint had to concern a law that implicated public policy. The district court instead concluded that Biffert was required to have blown the whistle for the protection of someone other than herself. The district court correctly applied current caselaw, which requires that a whistleblower must act for someone in addition to herself—she must be blowing the whistle for the protection of the general public or some third person or persons. *See id*. at 227. While Biffert is correct that the language of the WMA itself does not expressly refer to protection of the general public, current Minnesota Supreme Court precedent, which we are bound to follow, recognizes that protection of the general public is a purpose behind the MWA and that a good-faith report requires a showing of such protection. *See Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439–40 (Minn. App. 2005) (providing that the Minnesota Court of Appeals is bound to follow Minnesota Supreme Court precedent), *review denied* (Minn. June 14, 2005).

Biffert's amended complaint asserts that she "reported violations or suspected violations" of state law to DeVries and DOLI. If we assume that Biffert's

communications with DeVries and DOLI constituted reports for the purpose of exposing an illegality, the record must also show that she made her report for the protection of someone in addition to herself. It does not. The only time that Biffert claimed her that "report" was made for a third party was at the motion hearing when her attorney stated that Biffert's coworkers were also having difficulty accessing their statements. Attorney arguments are not evidence. *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004). Biffert did not submit an affidavit supporting her attorney's claim that other employees at the agency were not able to access their statements, nor did her complaint ever allege such a fact. We conclude as a matter of law that Biffert failed to establish that she made a good-faith report under the MWA, and she therefore failed to establish a prima facie claim under the MWA.

Biffert argues that, even if she did not make a good-faith report under the MWA, she can nonetheless establish a prima facie case under the act because she participated in an "investigation." *See* Minn. Stat. § 181.932, subd. 1(2) (providing that being requested by a public office to participate in an investigation is a protected act under the MWA). She claims that DOLI requested that she participate in an "investigation" because the title of the representative with whom she spoke at DOLI included the word "investigator," and because the "investigator" asked her some questions in the course of their conversation. This argument was not presented in any form to the district court and is therefore not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Additionally, Biffert points to no authority or persuasive argument supporting the conclusion that the interaction that she had with the DOLI representative constituted an

"investigation" under the MWA, and we therefore decline to address this argument. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (explaining that this court may decline to address allegations unsupported by legal analysis or citation).

Because Biffert did not provide facts sufficient to support a conclusion that she made a good-faith report under the MWA, it was not erroneous for the district court to conclude that she failed to establish an essential element of her MWA claim. Amending her admissions would do nothing to overcome this failure or to advance her claim. As such, the district court did not abuse its discretion in denying Biffert's motion to amend her admissions. *See* Minn. R. Civ. P. 36.02 (providing that a party may be allowed to amend its admissions when amendment would help present the merits of a claim).

III

This court "review[s] a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see* Minn. R. Civ. P. 56.03.

As discussed above, the district court did not abuse its discretion when it denied Biffert's motion to amend her admissions because the amendment would not have

promoted presentation of the merits of her claim. Biffert's admission that her MWA claim should be dismissed on the merits was therefore conclusively established under Minn. R. Civ. P. 36.02. Because Biffert's admission established that the agency was entitled to judgment as a matter of law, summary judgment was proper. Minn. R. Civ. P. 56.03. Additionally, summary judgment is properly granted against a party who fails to establish an essential element of a claim on which that party has the burden of proof. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). As the party bringing the MWA claim, Biffert had the burden of proof to establish that she made a good-faith report or engaged in some other protected activity, which she failed to do. *See Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007).

Biffert argues that summary judgment was not proper because the agency did not serve a cross-motion to dismiss and instead raised its dismissal motion in its opposition to her motion to amend. This, according to Biffert, resulted in untimely notice and unfair prejudice against her.[1] Prejudice occurs "when a trial court denies any opportunity to marshal evidence in opposition to a basis for summary judgment." *Doe v. Brainerd Int'l Raceway, Inc.*, 514 N.W.2d 811, 822 (Minn. App. 1994), *rev'd on other grounds*, 533 N.W.2d 617 (Minn. 1995). The record does not support the conclusion that Biffert was

[1] In fact, Biffert argues the agency never moved for summary judgment in this case. The record does not support Biffert's position. The agency's opposition to Biffert's motion to amend requested *either* judgment on the pleadings or summary judgment. Additionally, during argument before the district court, Biffert recognized that she believed the agency had in fact moved for summary judgment by stating that "it's really inappropriate to bring a motion for summary judgment at this [stage of the case]."

denied an opportunity to oppose summary judgment or that she was otherwise unfairly prejudiced.

Biffert was on notice that the merits of her claim would be at issue during the hearing on her motion to amend her admissions. Not only was Biffert seeking to withdraw an admission that her claim should be dismissed on its *merits*, but a motion to amend admissions under Minn. R. Civ. P. 36.02 puts the merits at issue because amendment is permissible only when it would serve presentation of the *merits* of the action.

Moreover, Biffert's argument that she was prejudiced because she needed more time to "flesh out her claim" that she made her "report" for the benefit of her coworkers is unpersuasive. Biffert's own motion to amend was served nearly a month before the motion hearing. The agency served Biffert its opposition to her motion to amend more than ten days before the scheduled hearing. *See* Minn. R. Civ. P. 56.03 (requiring that a motion for summary judgment be served at least ten days before a hearing). If Biffert needed more time to gather affidavits, she could have moved for a continuance. She made no such motion. Moreover, we hesitate to conclude that additional time would have led to a different result for Biffert because evidence of her reasons for and on whose behalf she made her "report" was always in her possession. *See U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 433–34 (Minn. App. 2000) (analyzing the burden of a party attempting to survive summary judgment and providing that the relative availability of evidence to the parties is a factor to be considered), *review denied* (Minn. Oct. 25, 2000); *see also Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002) (providing that

summary judgment cannot be defeated by unverified and conclusory allegations or postulating evidence that might be presented at trial). Finally, Biffert waived her ability to claim that she was prejudiced by a lack of notice when she failed to request an opportunity to present additional evidence to oppose summary judgment in the month that passed between the time her case was dismissed and the time judgment was entered. *See Rexton, Inc. v. State*, 521 N.W.2d 51, 53 (Minn. App. 1994) (rejecting as waived appellant's argument that summary judgment was entered without proper notice even though the motion was made less than ten days before the motion hearing because at least fifteen days had passed, without objection, between the date of order and entry of judgment).

Affirmed.