STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1465

Mahumud Shirwa,
Appellant,

vs.

Northern Star, Inc.,
Respondent.

Filed March 18, 2013
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CV-11-18524

Mahumud Shirwa, Plymouth, Minnesota (pro se appellant)

Robert Zeglovitch, Law Offices of Robert Zeglovitch, St. Paul, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Collins, Judge.*

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

HOOTEN, Judge

After his termination from employment for allegedly violating respondent's no-fault attendance policy, appellant brought suit under Minnesota's Whistleblower Act,

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

claiming that his termination was in retaliation for asserting various safety complaints. On appeal, appellant claims that the district court erred by dismissing his whistleblower claim, and that he is entitled to relief under the Family and Medical Leave Act (FMLA). We affirm.

FACTS

Appellant Mahamud Shirwa[1] began employment with respondent Northern Star Co.[2] in May 2008 as a sanitor. His duties included the cleaning of food-processing equipment. Northern Star received a number of work-related complaints from appellant. In a letter dated November 21, 2009, appellant informed Northern Star of three incidents. In September 2009, appellant was cleaning a belt when it suddenly began moving. He was able to remove his hand before it got caught, but suffered an insignificant bruise. He reported the incident to his supervisor but did not disclose the injury. In early November 2009, appellant was again cleaning belt equipment when the belt began to move, but he was able to move his hand without injury.

A similar incident occurred on November 18, 2009, resulting in a cut on appellant's hand. In a letter dated November 21, 2009, appellant informed company

[1] Appellant spells his name "Mahamud," but the district court's order and judgment refer to "Mahumud." The caption on appeal must match the caption used in the district court's decision, *see* Minn. R. Civ. App. P. 143.01, but we use appellant's preferred spelling in the body of this opinion.

[2] The district court directed that Northern Star Co. be substituted as the defendant in the underlying matter. But the caption was not changed to reflect that substitution. Accordingly, we refer to Northern Star Inc. in the caption, but to Northern Star Co. in the body of this opinion

officials that "there were two other times that I was close" but had not been injured. After noting these three incidents, appellant closed his letter with the following:

> My general concern here is the reoccurrence of such accident in the future and [whether] another accident, God forbid, might cause harm either to me or some other worker. I would like this safety issue to be addressed in [a] manner consistent with best guidelines of the company so that incidents like [this] are avoided.

After delivering his letter, appellant's supervisor called him into a meeting with a number of company officials, including Northern Star's human resource manager. Appellant stated that he had no intention in writing the letter, but was concerned with safety. On November 26, 2009, appellant received a written disciplinary warning regarding the November 18 incident stating that appellant refused to follow company policy and committed insubordination by failing to confirm that the belt was locked. Appellant sent Northern Star's human resource division a second letter, dated November 29, 2009, asserting his belief that his supervisor was "reacting to the safety concerns that [he] raised with Human Resources in his shift and [asserting his belief that his supervisor's] actions [were] not improving the safety of the employees by blaming employees themselves on series of judgment lapses by a certain employee."

On February 6, 2010, appellant's supervisor asked him to use a chemical mix to clean an area of the plant. Despite expressing reservation that use of the chemical would be dangerous, appellant used the chemical as instructed. A chemical reaction resulted because another chemical had been previously applied to the area, causing a co-worker to become ill and require hospitalization. Appellant stated that he informed his supervisor

that the incident caused him to vomit and experience difficulty breathing. Northern Star's human resources manager stated that he was not aware that appellant registered any complaints about this incident.[3]

In May 2010, appellant accepted a new position at Northern Star's Chaska operation as a case packer. Northern Star instituted a new attendance policy which became effective January 1, 2011. The new policy awarded points for absences and tardiness without regard to any prior attendance record. The policy provided that an "[e]arly out, missed meeting and tardy" earns one-half point, absences earn one point, and a "[n]o [c]all, [n]o show" earns three points. Northern Star described the policy as a "no fault attendance program" and exempted only approved absences. Appellant attended an informational meeting about the new policy on December 1, 2010. Pursuant to the policy, "employees are subject to discipline based on accumulated points during the previous 90 days." "[A]ccumulation of [five] points would result in a written warning; [six] points in a suspension for 24 work hours and a final warning; and [seven] points in employment subject to termination."[4]

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[3] Appellant testified about various instances of differential treatment after these safety complaints. Northern Star's human resource manager filed an affidavit explaining the circumstances attendant to these allegations, and the district court refused to credit these allegations. On appeal, appellant argues that his safety complaints resulted in his discharge after violating the attendance policy without relying upon allegations of differential treatment.

[4] All employees received a laminated card with an "absence phone line" number and a mandate: "Must call in PRIOR to the start of your shift for each day of absence or if you will be late." Employees were informed that if they failed to do so, they would be charged with three points for a no call/no show. Further, the policy provided that "illness is not an approved absence," and charged one point for consecutive days when an employee is absent and provides human resources with a doctor's note. If a doctor's note

On the morning of December 31, 2010, appellant suffered injuries in a car accident on his way to work and called in prior to the start of his shift to report his absence. Appellant missed his next scheduled day of work on January 3, 2011, but called in before the beginning of his shift. He received one point for this absence under the new policy. He was again absent from work on January 4 and 5, and failed to report these absences prior to the start of his shift. As of the start of appellant's shift on January 5, he had accumulated seven points under the new attendance policy.

On January 4, appellant saw a chiropractor for his injuries, and attempted to see a second doctor who was not able to see him until the next day. Northern Star received a faxed letter from the second doctor late in the afternoon of January 5 representing that appellant was totally incapacitated. Appellant testified that, on this same day, he informed the human resource director of the accident and his injuries, but learned that Northern Star had not received any medical documentation. On January 6, Northern Star received an additional fax from the second doctor stating that appellant had been totally incapacitated since December 31, and that he would remain so through at least January 15. Appellant claims to have personally faxed a letter about his injuries "three or four times" to Northern Star, including on January 4. While the record reflects that the second letter was faxed to Northern Star on January 7 at 5:25 p.m., appellant admitted that he did not have copies of the earlier fax confirmations. But appellant emphasized that he was "sure that [he] sent that letter on January 4th and they received it." Nevertheless, on

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is not provided, one point is charged for each absent day, and the three-point charge for a no call/no show still applies.

January 7, Northern Star terminated appellant's employment because he had accumulated seven points under the attendance policy.[5]

The district court granted Northern Star's motion for summary judgment, dismissing appellant's claim that his termination was in violation of the Whistleblower Act, Minn. Stat. § 181.932, subd. 1 (2012). It concluded that appellant failed to establish a prima facie case of retaliation because he failed to show that he engaged in statutorily-protected conduct and the existence of a causal connection between statutorily-protected conduct, if any, and his termination. The district court also concluded that appellant failed to show that the reasons behind his termination were a pretext for retaliation. This appeal follows.

D E C I S I O N

Minn. R. Civ. P. 56 permits "a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). To survive summary

[5] Appellant received a form letter from Northern Star dated January 6 recognizing that he was absent because of a serious health condition and that, "[u]pon qualification," his time off would be considered short-term disability and family medical leave. Northern Star's human resources manager admits that this was sent to appellant by an assistant from human resources, but states that appellant did not return any documentation sent to him. Notably, while appellant includes a copy of this letter in his "Supplemental Appendix" on appeal, the letter itself is not found anywhere in the district court record. We granted respondent's motion to strike appellant's Supplemental Appendix on December 21, 2012.

judgment, the nonmoving party must "establish that there is a genuine issue of material fact through 'substantial evidence.'" *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quoting *DLH*, 566 N.W.2d at 70 (stating that "substantial evidence refers to legal sufficiency and not quantum of evidence" (quotations omitted))). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH*, 566 N.W.2d at 70.

"[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* at 71. "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." *Lubbers*, 539 N.W.2d at 401. On review of a district court's grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Id.* "A summary judgment based on application of a statute to undisputed facts receives de novo review." *Gee v. Minn. State Colls. and Univs.*, 700 N.W.2d 548, 552 (Minn. App. 2005).

I.

Under Minnesota's whistleblower statute, an employer shall not discharge an employee because "the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer." Minn. Stat. § 181.932, subd. 1(a) (2012). Whistleblower claims are analyzed under the *McDonnell Douglas* burden-shifting test. *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323,

329 (Minn. App. 2007). "First, a plaintiff must establish a prima facie case of retaliatory action." *Id.* "A prima facie case of retaliatory discharge under the whistleblower statute requires the employee to demonstrate statutorily protected conduct by the employee, an adverse employment action by the employer, and a causal connection between the two." *Gee*, 700 N.W.2d at 555. "Then the burden of production shifts to the employer to articulate a legitimate, non-retaliatory reason for its action." *Grundtner*, 730 N.W.2d at 329. "Finally, the employee may demonstrate that the employer's articulated reason is pretextual." *Id.* "The employee bears the overall burden of persuasion." *Id.*

A. Statutorily-Protected Conduct

Appellant asserts that the district court erred by concluding that he did not engage in protected activity because he did not establish that any laws were broken. He argues that his safety concerns implicated violations of OSHA regulations addressing "Lockout/Tagout" procedures and chemical reactivity hazards. "To engage in a protected activity an employee must make a good-faith report[6] that implicates a violation or suspected violation of federal or state law or rule adopted pursuant to law." *Grundtner*, 730 N.W.2d at 329.

> An employee need not identify the specific law that the employee believes was violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint . . . and the employee alleges

[6] The district court made no specific findings regarding whether appellant's reports of suspected safety violations were made in good faith for purposes of exposing illegality. In light of our conclusion that there is no causal connection between appellant's reports and his termination and that appellant failed to show that Northern Star's reason for his termination was a pretext for retaliation, we need not address this issue.

> facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.

Gee, 700 N.W.2d at 556 (alteration in original) (quotation omitted). Case law indicates that "reported conduct must at least implicate a violation of law," but "there need not be an actual violation of law." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000).

The district court did not discuss or analyze federal regulations, but concluded that nothing on the face of appellant's safety complaints directly implicated any violation or suspected violation of state or federal law, and that the reports merely raised general concerns about safety. Appellant's letters about the unexpected movement of belts during cleaning are not accompanied by much detail about how the safety violations actually occurred. However, appellant correctly asserts that federal regulations implicate lockout and tagout procedures around sources of hazardous energy. *See* 29 C.F.R. § 1910.147 (2010). The regulations mandate that an

> employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative.

Id. at § 1910.147(c)(1). Specifically, the regulations require that these procedures cover shut-down procedures, isolation between energy sources and machinery or equipment, application of lockout devices, and verification that machinery or equipment has been isolated or disconnected from energy sources. *Id.* at § 1910.147(d). There are also

detailed mandates addressing the removal of lockout devices and restoration of energy. *Id.* at § 1910.147(e).

Appellant requested that the issues be "addressed in a manner consistent with best guidelines of the company." In concluding that appellant did not engage in protected activity, the district court explained:

> There is no way of discerning from the content of [appellant's] reports that if the facts were true, a specific law or rule was violated. This is [appellant's] burden, and because he did not report such facts, he cannot establish that he made a report protected by the Whistleblower Act.

The district court's reasoning is inherently inconsistent with *Obst* and the language of section 181.932, subdivision 1(a), which do not require an actual violation of law, but permit claims of suspected violations of a law or a rule adopted pursuant to law. In *Hedglin v. City of Willmar*, 582 N.W.2d 897, 902 (Minn. 1998), for instance, the supreme court concluded that an employee's reports that firefighters were driving fire trucks to fire calls while drunk and officials were falsifying roll-call sheets both implicated possible state law violations and were protected by the whistleblower statute. There was no consideration of whether the contents of the allegations would, if proven, constitute an actual violation of applicable state laws. Rather, "for purposes of the whistleblower statute, it is irrelevant whether there were any actual violations; the only requirement is that the reports of state law violations were made in good faith." *Hedglin*, 582 N.W.2d at 902; *see also Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 496 (Minn. App. 1996) (finding good-faith suspicion of health code and safety violations sufficient to invoke whistleblower protection). Given the applicable federal regulations and the content of

appellant's letters, the district court erred in concluding that appellant did not engage in statutorily-protected conduct.[7]

B. Causal Connection

However, the district court correctly concluded that appellant failed to establish a causal connection between his safety complaints and his termination from employment. This court is "mindful that retaliatory motive is difficult to prove by direct evidence and that an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley v. City of Otsego*, 623 N.W.2d 625, 632 (Minn. App. 2001), *review denied* (Minn. May 15, 2011). "Speculation, however, is not circumstantial evidence. A fact is proved by circumstantial evidence when its existence can *reasonably be inferred from other facts proved in the case*." *Id.* at 633. An inference of a retaliatory motive may be proven by "showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." *Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 445 (Minn. 1983). "Although a short interval between a plaintiff's protected activity and an adverse employment action may occasionally raise an inference of causation, in general, more than a temporal connection is required[.]" *Freeman v. Ace Telephone Ass'n*, 467 F.3d 695, 697–98 (8th Cir. 2006) (internal citations omitted).

[7] However, this conclusion is not applicable to the chemical incident. The record merely reflects that appellant expressed reservation that use of the chemical would be dangerous. It appears undisputed that Northern Star human resources was unaware that appellant complained in any manner about this incident, and appellant admitted that he informed human resources about general problems with handling chemicals but not about the specific incident at issue.

Appellant was terminated more than 13 months after submitting his November 21, 2009 letter. Federal case law persuasively implicates significantly shorter periods of time between protected conduct and termination. *Compare E.E.O.C. v. Kohler Co.*, 335 F.3d 766, 774–75 (8th Cir. 2003) (concluding that causal connection existed given relatively short temporal proximity of either hours or less than one month between complaint and discharge in Title VII case); *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002) (affirming finding of causal connection in an FMLA-retaliation case in light of two-week period between beginning of leave and discharge); *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113–14 (8th Cir. 2001) (holding that a proximity of "a matter of weeks" between disclosure of potentially debilitating condition and an adverse employment action was sufficient to support a causal connection); *with Kipp v. Mo. Highway and Transp. Com'n*, 280 F.3d 893, 897 (8th Cir. 2002) (concluding that two-month period between complaint and termination "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding . . . on the matter of causal link.").

Beyond the issue of mere temporal connection, there are no facts in the record from which one may infer any causal connection. The district court recognized that appellant was disciplined shortly after the belt incident on November 18, 2009, but concluded that this was not evidence of causation because appellant did not lose any pay or benefits as a result. The record does not reflect that appellant suffered any consequences because of this warning. His argument on appeal merely asserts that "[a] reasonable jury could decide that there was no break in the chain of events and that [his

safety] complaints . . . made him a troublemaker who should be discharged at the first opportunity." Additionally, after his safety complaints, appellant accepted a new position with Northern Star in May 2010.

C. Pretext

The district court also correctly concluded that, even if appellant did make out a prima facie case, he failed to show that Northern Star's reason for his termination was a pretext for retaliation in that he was terminated pursuant to the newly enacted attendance policy. "An employee may meet the burden of persuasion on the issue of pretext by a preponderance of the evidence either by persuading the trier of fact 'that it is more likely the defendant was . . . motivated or that the defendant's proffered explanation is unworthy of credence.'" *Shockency v. Jefferson Lines*, 439 N.W.2d 715, 719 (Minn. 1989) (quoting *Lamb v. Village of Bagley*, 310 N.W.2d 508, 510 (Minn. 1981)). "Attendance problems may be a legitimate basis for an employer's decision to terminate an employee." *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 808 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992)

Despite appellant's deposition testimony disputing Northern Star's representation that it did not receive any documentation of his injuries by fax prior to January 5, he was "required to show that the circumstances permit a reasonable inference to be drawn that the real reason [for the] terminat[ion] was" retaliation. *See Johnson v. AT & T Corp.*, 422 F.3d 756, 763 (8th Cir. 2005) (focusing upon employer's honest belief that discharged employee engaged in conduct meriting termination). Appellant merely asserts that, in

light of his history of complaints, his accident and injuries "left him exposed" and presented Northern Star with "the first opportunity" to terminate him.

This argument fails to establish by a preponderance of the evidence that appellant's termination was a pretext for retaliation. Northern Star stresses that courts have no "authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). The district court correctly noted that appellant presented no evidence of similarly situated employees treated more favorably under the attendance policy. *See Kolstad v. Fairway Foods, Inc.*, 457 N.W.2d 728, 732–34 (Minn. App. 1990) (affirming finding of gender discrimination based, in part, upon comparison with male employee less severely disciplined). Northern Star's no-fault attendance policy may be unreasonably inflexible, but appellant has not satisfied his burden of establishing that his termination under the policy served as a pretext for retaliation.

II.

Appellant also argues that he is entitled to relief under the FMLA because he was entitled to time off due to his serious health condition, but was nevertheless terminated. The district court did not address any issues relating to the FMLA, and the issue did not appear in appellant's complaint or his opposition to Northern Star's motion for summary judgment. Accordingly, this issue is waived because it was never pleaded or raised before the district court. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the

matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotations omitted).

Appellant's argument that the issue should be treated as litigated by consent fails. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Minn. R. Civ. P. 15.02; *see also Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. App. 1994) (applying rule 15.02 to summary judgment proceeding). "'Issues litigated by either express or implied consent are treated as if they had been raised in the pleadings.'" *Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 919 (Minn. App. 1996) (quoting *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954)), *review denied* (Minn. Feb. 26, 1997). "Consent may be commonly implied where the parties fail to object to issues not raised by the pleadings." *Id.*

We focus on the district court record when determining whether parties have litigated an issue by consent. *See DeRosier v. Util. Sys. of Am., Inc.*, 780 N.W.2d 1, 5 (Minn. App. 2010). "There is a presumption that evidence is offered and received with reference to issues framed by the pleadings and consent is not implied where evidence is actually pertinent to such issues regardless of its other probative value." *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). "Implied consent to litigate an issue must be 'clearly indicated.'" *Hofer v. Hofer*, 386 N.W.2d 391, 393 (Minn. App. 1986) (quoting *Folk*, 336 N.W.2d at 267–68). It is apparent that the content of the record addressed appellant's employment history with Northern Star, the circumstances surrounding his safety complaints and allegations of differential treatment, and the

circumstances surrounding his accident, injuries, and termination. The parties used these facts to argue whether appellant established a prima facie case of his whistleblower claim and to scrutinize Northern Star's stated reason for terminating appellant's employment. There is scant evidence not relevant to appellant's whistleblower claim that may be used to support any implication that the parties addressed any issues beyond the pleadings.

Appellant argues that Northern Star's reference to possible FMLA leave "injected" the issue into the case. As noted, while Northern Star admits the existence of this letter, the record does not include an actual copy. *See MT Props., Inc. v. CMC Real Estate Corp.*, 481 N.W.2d 383, 389 (Minn. App. 1992) ("[M]ere reference to an issue by the parties does not constitute the intent to litigate the issue."). Northern Star's human resources manager referenced this letter during his deposition, but provided no further information beyond the limited explanation set forth in his affidavit. Notably, both references are found in documents submitted by Northern Star in support of its motion for summary judgment. There are no references to the FMLA in the record, including the materials submitted by appellant. Therefore, the parties did not implicitly litigate any FMLA claim, and this issue is waived on appeal.

Affirmed.