STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0241

Colleen M. Whelan,
Appellant,

vs.

Hennepin Healthcare System, Inc.,
a/k/a Hennepin County Medical Center,
Respondent.

Filed July 15, 2013
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CV-12-2074

Bruce P. Grostephan, Peterson, Engberg & Peterson, Minneapolis, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, Martin D. Munic, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HOOTEN, Judge

Appellant challenges the district court's conclusion that respondent did not violate the Public Employment Labor Relations Act (PELRA) or the Minnesota Government Data Practices Act (MGDPA) and that respondent was entitled to summary judgment on appellant's claim of defamation. We affirm.

FACTS

Appellant Colleen Whelan was employed as a registered nurse by respondent Hennepin County Medical Center (HCMC) from 1981 until she retired in May 2010. In February 2011, appellant began working for HCMC again as a casual nurse in the emergency department (ED). By definition, a casual nurse is one who has "no regular appointed scheduled hours" but must be available for at least two shifts per four-week scheduling period. Pursuant to this definition, appellant understood a casual nurse to be someone "who works 14 hours a week or less." As a casual nurse, appellant receives shifts by signing up, calling in, or responding to a "red alert." The red alert is a system used by the ED to alert available nurses when it is short-staffed. After becoming a casual nurse, appellant experienced difficulties with the red-alert system and was not alerted to available shifts through the system on multiple occasions.

On April 22, 2011, appellant called in to the ED to inquire whether there were any available shifts and was told there were not. Later that day, appellant's friend and fellow nurse, D.S., called appellant to inform her that the ED had sent out a red alert. Upon

learning that a red alert had been sent out and that she had not received it, appellant became frustrated because she wanted the hours.

Later that day, appellant called D.S. back at HCMC to thank her for thinking of appellant in regards to the shift. Pursuant to HCMC policy, which appellant had given signed consent to, HCMC records all phone calls. According to the consent form, the purpose of recording telephone calls includes, but is not limited to: "quality assurance, training and productivity values, assisting non-medical event and other legal investigations, and in areas that offer medical advice or counsel." A recording of the second phone call between appellant and D.S. reveals the following conversation, in which appellant vented her frustration regarding the system using expletives:

> Appellant: F---ing A, wouldn't you know someone snapped it up already.
>
> Appellant: I'm not getting those f---ing red alerts that I'm supposed to be getting. Tell who ever is in charge of that f---ing red alert thing I'm not getting them.
>
> D.S.: It's [O.B.].
>
> Appellant: I know and she never took care of it and now I'm pissed and I need the money. G-- d--- it, I could have been there first.

Following the second phone call, D.S. contacted a supervisor who agreed that appellant should have received the shift. D.S. called appellant back to offer her the shift with no answer. After three attempts to reach appellant, the shift was offered to another nurse.

On April 27, 2011, appellant filed a grievance to complain that she should have been offered the April 22 shift and to request pay for that shift. HCMC responded that, given appellant's status as a casual nurse, it did not believe that the issue was "grievable."

It further explained that appellant was not entitled to be paid for the shift because immediate steps were taken to correct the error.

During HCMC's investigation of appellant's grievance, it discovered the telephone conversation between appellant and D.S. Appellant's supervisor, M.L., scheduled a meeting at which she informed appellant that her conduct was unprofessional and violated HCMC workplace policies. On May 23, 2011, M.L. wrote appellant a letter, notifying her that she was receiving a verbal reprimand:

> You have received a verbal reprimand for unprofessional behavior and derogatory language used in a telephone conversation to a HCMC employee on 4/22/2011. It's our expectation for you to be in compliance with the HCMC Code of Conduct, Interpersonal Conduct, and Work place violence policies.

M.L. also e-mailed a human-resources representative who had requested information on the "final decision" in the matter, responding: "Verbal reprimand and if any other issues it would move to term."

In August 2011, appellant commenced this action against HCMC, alleging: retaliation for filing a grievance in violation of PELRA; violation of privacy in relation to the April 22, 2011 telephone call under the MGDPA; and defamation, slander, and libel in relation to the May 23, 2011 notification of the verbal reprimand. Appellant also requested declaratory relief that she was entitled to bring a grievance without retaliation under PELRA and was entitled to attorney fees and costs. On January 7, 2013, the district court entered summary judgment in favor of HCMC on all counts. This appeal follows.

D E C I S I O N

A district court must grant a motion for summary judgment if the evidence demonstrates "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. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to a summary-judgment ruling and views the evidence in the light most favorable to the non-moving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012).

I.

Appellant argues that HCMC violated PELRA by retaliating against her after she filed a grievance. It is an unfair labor practice for a public employer to retaliate against an employee for filing a grievance. *See Edina Educ. Ass'n v. Bd. of Educ. Indep. Sch. Dist. No. 273*, 562 N.W.2d 306, 310 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). Minnesota courts apply the *McDonnell Douglas* framework to determine whether a party has a viable retaliation claim. *See, e.g.*, *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). The *McDonnell Douglas* framework requires that an employee in a retaliatory action establish a prima facie case of retaliation. *Id.* If the employee establishes a prima facie case, the burden shifts to the employer to "articulate a legitimate non-retaliatory reason for its action." *Id.* If the employer articulates a

legitimate reason for the action, the employee must show that the employer's articulated reason is pretextual. *Id.*

The district court determined that summary judgment was appropriate because appellant failed to establish a prima facie case of retaliation. A prima facie case requires the employee to establish: (1) statutorily protected conduct by the employee; (2) an adverse employment action taken by the employer; and (3) a causal connection between the employee's conduct and the employer's adverse employment action. *Id.* (quotation omitted).

As an initial matter, the parties dispute whether appellant was a public employee and, therefore, whether PELRA applied to protect her conduct. Neither party disputes, and the district court found, that filing a grievance is a statutorily protected activity, assuming that the filer is a public employee subject to the protections of PELRA. *See* Minn. Stat. §§ 179A.06, subd. 1, .13, subd. 2 (2012); *Edina Educ. Ass'n*, 562 N.W.2d at 310. The district court declined to determine whether appellant was a public employee and resolved the issue on other grounds. Likewise, because we are able to resolve the issues on appeal upon other grounds, we do not address the issue of whether appellant was a public employee.

Appellant argues that she suffered an adverse employment action. "An adverse employment action must include some tangible change in duties or working conditions." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010). The changes must be material; a minor change to the employee's working conditions is insufficient to constitute an adverse employment action. *Id.*

Appellant asserts that the reprimand and the letter from M.L. indicating that the letter was the last step before termination were adverse employment actions. But since she fails to show how the reprimand or M.L.'s letter changed her working conditions, the reprimand and the letter alone were not adverse employment actions. *See id*.

Appellant also asserts that an alleged reduction to her hours after she filed the grievance amounted to an adverse employment action. Appellant attempts to prove this by comparing her hours after she was disciplined starting May 23, 2011, to her hours from the same weeks during previous years. But in previous years, appellant was a permanent employee who consistently worked approximately 56 hours per pay period. When appellant began working for HCMC again in 2011, she was hired as only a casual nurse who generally worked less than 28 hours per pay period. Appellant asserts in an affidavit that although she was hired as a casual nurse, she hoped to work enough hours to reach the same amount as when she worked as a permanent employee. But she did not submit any evidence that HCMC agreed to that arrangement. And a district court need not rely solely on self-serving affidavits, *see, e.g.*, *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009), or draw unreasonable inferences when considering a motion for summary judgment. *Superior Constr. Servs., Inc. v. Belton*, 749 N.W.2d 388, 393 (Minn. App. 2008). By definition, a casual nurse works intermittent shifts; appellant conceded as much in her deposition. Appellant's hope that she would again work 56 hours per pay period is insufficient to show that her hours decreased in retaliation to the filing of a grievance.

A more accurate barometer of whether appellant suffered an adverse employment action through a reduction in hours would be to compare the hours appellant worked from when she was rehired at the beginning of 2011 in her position as a casual nurse to the hours she worked after May 23, 2011, the date of the discipline. The record establishes that in the 15 weeks leading up to the date of her discipline, she worked an average of 12.32 hours per week. In the 15 weeks following her discipline, she worked an average of 18.62 hours per week. The record, then, reveals that appellant actually worked more hours after she was disciplined than before. Because appellant has failed to establish a decrease in her hours, the district court did not err by concluding that there was no adverse employment action and that appellant failed to establish a prima facie case of retaliation.

II.

Appellant argues that the district court erred by concluding that HCMC did not violate the MGDPA on the ground that the telephone call between appellant and D.S. was public data. Under the MGDPA, the personnel data of public employees is private unless otherwise provided by statute. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989). In relevant part, the MGDPA provides that the following personnel data is public: "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body." Minn. Stat. § 13.43, subd. 2(a)(5) (2012). "[A] final disposition occurs when the government entity makes its final decision about the disciplinary action, regardless of the possibility of any

later proceedings or court proceedings." *Id.*, subd. 2(b) (2012). On appeal, we apply a *de novo* standard of review to the question whether a party has disseminated private personnel data in violation of the MGDPA. *Navarre v. S. Wash. Cnty. Sch.*, 652 N.W.2d 9, 22 (Minn. 2002).

Here, HCMC made the final decision that appellant would receive a verbal reprimand. There is no dispute that HCMC neither took additional action nor planned to take additional action following notice of the verbal reprimand. Thus, the letter constituted "the final disposition of any disciplinary action" along with "the specific reasons for the action and data documenting the basis of the action." *See* Minn. Stat. § 13.43, subd. 2(a)(5). This is public data under the MGDPA.

Appellant also asserts that, because D.S. was a personal friend of hers and the telephone call was personal, the fact that she signed a consent form for her telephone calls to be monitored should not waive her right to keep the conversation private. But this appears to be a challenge to the disciplinary action itself and does not change the fact that the reprimand was a "final decision about the disciplinary action." *See* Minn. Stat. § 13.43, subd. 2(b). Moreover, the consent form allows recording for a variety of purposes, including legal investigations. The telephone call was discovered during an investigation into appellant's grievance, which is a "legal investigation." And although appellant claims that the telephone call was personal, it took place between two nurses and the subject related to work at HCMC. On these facts, we do not find that the district court erred by concluding that HCMC did not violate the MGDPA.

III.

Appellant argues that the district court erred by granting HCMC's motion for summary judgment on her claim of defamation. A party is immune from suit for defamation if the allegedly defamatory statement is absolutely privileged. *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010). Statements regarding public information are entitled to absolute privilege. *Rutherford v. Cnty. of Kandiyohi*, 449 N.W.2d 457, 463−64 (Minn. App. 1989), *review denied* (Minn. Feb. 28, 1990). Because appellant's disciplinary action was public information under the MGDPA, the district court did not err by concluding that HCMC was immune from suit.

There is also no merit to appellant's claim that the district court erred by failing to allow her to amend her complaint to plead with particularity the basis for her defamation claim pursuant to *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000). A district court may properly deny a party leave to amend the complaint when the amended claim would not survive a summary judgment motion. *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 272 (Minn. 2008). Here, the district court denied appellant's request to amend the complaint relative to the defamation claim because it did not base its entry of summary judgment on appellant's failure to plead her claim with particularity. Instead, the district court resolved the defamation claim by concluding that HCMC was immune from liability, which we have concluded was a proper resolution of that claim. Even if appellant were allowed to amend her complaint to plead defamation with particularity pursuant to *Moreno*, the defamation claim still would not have survived a summary judgment motion on the basis that HCMC

is immune from liability for the alleged defamatory statements. Under these circumstances, the district court did not err by denying appellant's request to amend her complaint.

Affirmed.