STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2328

Brian Chubboy,
Appellant,

vs.

Best Buy Co., Inc., et al.,
Respondents.

Filed September 16, 2013
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-10-18517

Steven A. Sondrall, Jensen Sondrall & Persellin, P.A., Brooklyn Park, Minnesota (for appellant)

Joseph W. Anthony, Brooke D. Anthony, Anthony Ostlund Baer & Louwagie, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Chief Judge; Ross, Judge; and Bjorkman, Judge.

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

ROSS, Judge

After more than two years of complaining about a wide range of company policies, procedures, and business decisions, Brian Chubboy was fired from his position as a procurement manager at Best Buy Stores. He sued his employer, alleging that his

discharge was retaliation for his reports of supposedly illegal activities—reports that, according to him, were protected under the Minnesota Whistleblower Act. Chubboy appeals the district court's grant of summary judgment in Best Buy's favor, arguing that the district court erred by refusing to consider his supplemental affidavit; that it abused its discretion by determining that his chosen expert witness was not qualified; and that it erred when it determined that Chubboy did not meet his burden of showing that he engaged in conduct protected by the Act, that there was a causal connection between his reports and his termination, and that Best Buy's stated reason for his termination was a pretext for retaliation. Because Chubboy fails to establish a causal link between any protected conduct and his termination, and because he fails to show that Best Buy's reason for discharging him was pretextual, we affirm.

FACTS

Best Buy Stores, L.P., hired Brian Chubboy as a procurement manager in 2004, and the company assigned him to its private label group in 2006. That group was responsible for managing products developed by Best Buy for in-store sales under its in-house brand names.

Chubboy asserts that he began complaining about a host of things in 2007. He complained to his supervisor that Best Buy's product development and acquisition procedures violated antitrust laws by raising unfair barriers for American companies and by improperly sharing competitors' trade secrets. He claims that he also reported "extensive bribery, illegal bid manipulation, bid collusion, bid rigging, refusing to deal, creating barriers to entry, threats, and corrupt business practices" in Best Buy's Asia

office. After he elevated his concerns to an in-house Best Buy attorney, Chubboy complains that his supervisor "retaliat[ed] [by] reduc[ing] interaction and communication." He also alleges that she "dramatically reduced the cell phone calls during and after work hours to [his] personal cell phone," denied his tardy reimbursement requests, and limited his business-travel opportunities. Chubboy maintains that his supervisor criticized his commitment to the company's values, "defame[d] [his] character and persecuted [him] in weekly 1:1 sessions," required him to complete "a step by step action plan," and withheld from him incentive-based stock options. There was no mention of his alleged report on his next annual performance review.

In December 2008, Chubboy joined the technical advisory board for Symwave, Inc., a company that was seeking an investment from Best Buy. After discovering a press release announcing Chubboy's Symwave position, Chubboy's supervisor confronted him and told him that she was "very disappointed" that he had not informed her of his membership on Symwave's board. She stated that it was a conflict of interest in violation of Best Buy's employee policies. Accenture, an independent company retained by Best Buy, investigated, finding that Chubboy had violated Best Buy's conflict-of-interest policies by failing to report his relationship with Symwave as a potential conflict of interest and by using Best Buy facilities to host a meeting with Symwave. Chubboy denied having any conflict of interest.

Best Buy discharged Chubboy in April 2009, ostensibly for violating its conflict-of-interest policy. Chubboy sued, alleging that Best Buy had illegally manipulated bids, committed fraud, acquiesced in violations of Chinese labor laws, failed to enforce

agreements in violation of its obligations to shareholders, violated its own corporate governance policies, shared other companies' proprietary information, and violated confidentiality agreements. He asserted that retaliation for his reports about "these federal law violations" was the true reason for his termination, and he sought damages and attorney fees under the Minnesota Whistleblower Act.

After a lengthy discovery period, Best Buy moved for summary judgment in October 2011. It had recently deposed Chubboy over the course of three days in August and October. In January 2012, the district court granted Chubboy's request for an additional discovery period limited to meeting outstanding discovery requests. The district court granted Best Buy's motion to exclude Chubboy's expert witness on April 26, 2012. Chubboy again asked to extend the discovery period, this time to obtain another expert witness, and the district court again granted his motion and allowed him to conduct another deposition.

Months after his own deposition, Chubboy executed a supplemental affidavit on July 24, 2012. In it, he alleged that he had made numerous previously undisclosed reports of "wrongful conduct" at Best Buy in 2008 and 2009 during one-on-one conversations with his supervisor. He also asserted that she had retaliated for the 2008 reports by stating that he would not be eligible for a "good raise" or a promotion, by suggesting he meet with the human-resources department to "discuss [his] career goals," by criticizing his work performance, and by "stating [that he] was not living and teaching Best Buy values." He alleged further that his supervisor retaliated by initiating a peer-review process, by requiring him to attend counseling, by ordering him to make reports that she

did not require of other employees, and by denying him business-travel opportunities. Chubboy asserted additionally that his supervisor pursued the conflict-of-interest investigation into his board membership with Symwave as an act of retaliation. He maintained that he never received instructions to recuse himself and that he had no conflict of interest because Symwave was not a competitor or supplier to Best Buy. And he asserted that the conduct he had reported in 2008 and 2009 defrauded Best Buy investors, violated Best Buy's ethics code, and violated numerous federal and state statutes. He finally alleged that his complaints about Best Buy's actions were the real cause for his discharge.

The district court granted Best Buy's motion for summary judgment. It ruled that Chubboy's supplemental affidavit could not prevent summary judgment because his earlier deposition testimony contradicted the affidavit, and it also ruled that the affidavit violated the district court's limits on supplemental submissions. The court alternatively held that the affidavit failed to raise any genuine issue of material fact even if it had been considered.

Chubboy appeals the district court's summary judgment decision.

D E C I S I O N

Chubboy challenges the district court's grant of summary judgment to Best Buy. We review the district court's grant of summary judgment de novo, determining whether the district court properly applied the law and whether there were any genuine issues of material fact that precluded summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We view the evidence in the light

most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But "when 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." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The nonmoving party must do more than rest on mere averments and must create more than a mere metaphysical doubt regarding an essential element. *Id.* A complete lack of proof of any essential element supports summary judgment. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

Chubboy argues that he presented sufficient evidence to raise a genuine issue of material fact as to whether Best Buy terminated his employment in retaliation for his whistleblowing reports. But we conclude that Chubboy fails to raise genuine issues of material fact on at least two essential elements of his whistleblower claim. The Minnesota Whistleblower Act prohibits employers from retaliating against an employee who, "in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1) (2012). To avoid summary judgment in a whistleblower claim, a plaintiff must first make a prima facie showing that he engaged in protected conduct, that his employer took an adverse employment action against him, and that a causal connection links the two. *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 329 (Minn. App. 2007). If he makes this prima facie showing, the burden shifts to the employer to offer a nonretaliatory justification for the adverse employment action. *Id.* The employee must then demonstrate that the employer's reason is merely a pretext for

the alleged improper motive. *Id.* The employee bears the burden of proof for each essential element of a whistleblower claim. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001).

Assuming, for the sake of analysis only, that Chubboy could meet the other elements, he fails to meet his burden to show causation or pretext. Chubboy did not provide any direct evidence that his termination was caused by his reports of allegedly illegal behavior. It is true that an employee's burden to show a causal connection might be met by circumstantial evidence, including temporal proximity between the protected conduct and the adverse employment action. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995). But a temporal connection alone is generally not enough to infer causation. *Freeman v. Ace Tel. Ass'n*, 467 F.3d 695, 697–98 (8th Cir. 2006) (addressing claim under Minnesota Whistleblower Act). And speculation is not circumstantial evidence of causation. *Cokley*, 623 N.W.2d at 633.

Even if we assume that all of Chubboy's claimed reports (including those in his supplemental affidavit not considered by the district court) occurred, Best Buy continued to give him satisfactory performance reviews and financial bonuses for two years after his stream of reports began. It was only after Chubboy accepted a position with Symwave, failed to immediately report it, and arranged the purportedly conflicting-interest meetings with Symwave using Best Buy facilities, that he was fired. This intervening behavior undermines any inference that Chubboy's termination resulted from his allegedly chronic reporting. *Cf. Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (holding that intervening unprotected conduct undermines any inference

of causation between protected conduct and an adverse employment action). The before-and-after relationship between Chubboy's complaints and his termination is not sufficient circumstantial evidence that Best Buy's termination decision was motivated by Chubboy's complaints because the intervening conflict-of-interest policy violation erodes any inference of causation.

And he has not shown pretext. An employee can meet his burden to show that a company's stated reason for his termination is a pretext for retaliation either by affirmatively showing that the company's real motive was retaliatory or by showing that the company's stated reason is not worthy of credence. *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 153 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Chubboy's whistleblower claim can survive summary judgment only if he presents evidence tending to prove that Best Buy did not genuinely conclude that his membership on the Symwave technical advisory board presented a termination-worthy conflict of interest.

The record confirms the district court's perception that Best Buy's stated reasons for firing Chubboy are reasonable and not obviously incredible. The undisputed facts establish that Best Buy terminated Chubboy's employment after the following events: Chubboy initially expressly refused to cooperate with his supervisors' request for information about his involvement with a business that Best Buy was looking to invest in and that Chubboy was financially interested in. Chubboy conducted a meeting between this business and Best Buy at a Best Buy facility during Best Buy business hours. His conduct during the meeting prompted one Best Buy attendee to report that Chubboy

seemed to be acting more as a representative of the other business than Best Buy. These facts—brought to light during an independent investigation—objectively support Best Buy's position that it perceived that Chubboy had violated its conflict-of-interest policy. Chubboy's personal belief that he did not actually have a conflict of interest and that his behavior regarding Symwave was appropriate, however passionately he holds it, does not render Best Buy's stated reasons pretextual.

Chubboy's most specific pretext argument rests on his comparison between his actions and those of another employee, who was not fired. Chubboy asserts that Nigel Waites, an allegedly similarly situated Best Buy employee, kept his job despite engaging in conduct similar to that for which Best Buy discharged Chubboy. Because a jury may infer that different treatment of similarly situated employees is evidence of a pretext, *see Eliserio v. United Steelworkers of Am. Local 310*, 398 F.3d 1071, 1079–80 (8th Cir. 2005), such an example might, in other circumstances, be sufficient to defeat summary judgment. But Chubboy and Waites were not similarly situated and their conduct differed. Most significantly, Best Buy had already invested in the company with which Waites held his board position, mitigating or eliminating any potential conflict of interest. But Symwave was seeking (and Chubboy held a meeting to promote) Best Buy's investment in it, raising self-evident conflict-of-interest concerns. Waites also immediately and fully disclosed his board membership with the other company, while Chubboy at first refused Best Buy's request for complete disclosure. The evidence viewed in a light most favorable to Chubboy does not raise a genuine issue of material fact that Best Buy's stated reason for terminating him was pretextual.

Chubboy also argues that the district court failed to consider "a series of increasingly severe adverse employment actions" with termination at its "zenith." Best Buy asserts that Chubboy waived his argument based on those incidents when he told the district court that it need not consider any employment actions other than termination. The record shows that Chubboy's concession actually bore only on the element of whether he suffered an adverse employment action but that he continued to maintain that those other allegedly adverse actions supported his argument as to causation. Particularly, he argued then, as he does on appeal, that the pattern of adverse actions creates and maintains a link between the onset of his chronic reporting and his eventual discharge. Chubboy is correct that the district court failed to address the impact of the multiple alleged, nontermination adverse employment actions when it considered the causation element of his claim. But our independent review of his claimed adverse employment actions gives us no reason to reverse.

"A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the causation requirement" for a retaliatory discharge claim. *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002). Chubboy lists 26 purportedly adverse employment actions that Best Buy took against him beginning in 2007 and ending at (or actually beyond) his termination. But almost none of them qualify as adverse employment actions. An adverse employment action is an action by an employer that creates a "material employment disadvantage." *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 992 (8th Cir. 2003). This does not include "[m]ere inconvenience[s]" or "minor changes in working conditions," which are not adverse

employment actions. *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841–42 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007).

All but two of the actions Chubboy highlights fail to qualify as adverse employment actions. These nonqualifying actions fall into four general categories: (1) Chubboy's own criticism of Best Buy's processes in addressing his alleged reports of illegal behavior, all lacking any stated impact on the terms or conditions of his employment; (2) apparently inconsequential changes in informal interpersonal workplace interactions; (3) evaluative management commentary and routine discretionary management actions, also without any stated employment-related impact; and (4) Chubboy's subjective apprehension about potential future employment-related impact. None of these alleged incidents qualifies as an adverse employment action because none comes with any relevant facts or carries a reasonable inference that it created any material employment disadvantage.

Only two actions that Chubboy alleges raise the potential inference that they might constitute genuine adverse employment actions: Best Buy's alleged refusal to reimburse Chubboy for corporate travel expenses in March 2008 and its August 2008 denial of a stock-option award. But Chubboy does not allege that these incidents (which Best Buy urges are outside the statute-of-limitations period) are themselves actionable, and we conclude that they do not raise a genuine issue of material fact that Chubboy faced an escalating pattern of retaliatory actions culminating in his discharge. Chubboy does not direct us to any evidence, such as an allegation that other similarly situated employees were treated differently, indicating that these pre-termination actions were caused by his

alleged reports of illegal activity at Best Buy. *See Eliserio*, 398 F.3d at 1079–80 (holding that differing treatment of similarly situated employees may be evidence of retaliatory intent). He likewise did not provide this link or cite to supporting evidence in his argument to the district court, which had no "obligation to plumb the record in order to find a genuine issue of material fact" or "to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 260 (8th Cir. 1996) (quotation omitted); *see also Rodgers v. City of Des Moines*, 435 F.3d 904, 908 (8th Cir. 2006) ("[W]e will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments.").

When we look to those specific portions in the record that Chubboy highlights in their more informative context, it appears that both of the adverse employment actions Chubboy alleges were routine exercises of management's discretion rather than acts of retaliation. Best Buy provided a legitimate reason for refusing to reimburse Chubboy for the March 2008 travel expenses: Chubboy submitted his reimbursement forms late. And Chubboy admitted in his deposition that he *did* receive stock options from Best Buy in the summer of 2008, and he made only a vague assertion that some unidentified additional stock options were withheld. Neither of these is sufficient to raise a genuine issue of material fact that Chubboy faced an escalating pattern of retaliation prior to his discharge.

We need not address Chubboy's other arguments, which all fail because Chubboy has not introduced genuine issues of material fact proving causation or pretext.

Affirmed.