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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0301**

Mark Osland,
Appellant,

vs.

City of Minneapolis,
Respondent.

**Filed September 4, 2018
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-16-13720

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Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and
Smith, John, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant police sergeant challenges the summary-judgment dismissal of his whistleblower claim against respondent city. Appellant argues that the district court erroneously determined that there are no genuine issues of material fact that could allow appellant to establish that the city's failure to promote him to the rank of lieutenant violated the Minnesota whistleblower act (MWA), Minn. Stat. § 181.932 (2016). We affirm.

FACTS

Appellant Mark Osland joined the Minneapolis Police Department as a police officer in 1989. He was promoted to sergeant in 1998 and currently works as an investigator in the department's assault unit. Although Osland has sought a promotion to the rank of lieutenant since 2005, he has not been promoted to a permanent lieutenant position or assigned to a temporary "detail" position to cover a leave of absence taken by a permanent lieutenant.

Osland alleges that the city violated the MWA by failing to promote him in retaliation for him engaging in five instances of protected conduct from 2007 through 2015. Those five instances are (1) filing an internal complaint in 2007 asserting sexual-orientation discrimination by his supervisor; (2) joining a 2009 lawsuit, which ultimately settled, against the department alleging retaliation for the 2007 complaint; (3) declining a colleague's request in 2010 or 2011 to recommend felony assault charges against a person who had filed a civil suit against the city, and informing the county attorney about the purported request; (4) giving a statement in 2014 or 2015 as part of a United States

Department of Justice investigation of the 2010-2011 events; and (5) filing an internal complaint in December 2015 asserting that he was denied promotions due to his earlier protected conduct.

The city moved for summary judgment, and the district court granted the city's motion, reasoning that Osland did not offer evidence that would establish (1) a prima facie case under the MWA or (2) that the department's reason for not promoting him was pretextual. This appeal follows.

D E C I S I O N

We review summary judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We “determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.* The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists if a rational fact-finder, when considering the record as a whole, could find for the non-moving party. *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

Under the MWA:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) the employee . . . in good faith, reports a violation, suspected violation, or planned 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;
(2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry.

Minn. Stat. § 181.932, subd. 1.

When analyzing a whistleblower claim, Minnesota courts apply the three-step burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). *Cokley v. City of Ostego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). The *McDonnell Douglas* burden-shifting framework requires the plaintiff to establish a prima facie case, the employer to articulate a legitimate, nonretaliatory reason for its action, and the plaintiff to demonstrate that the articulated reason is pretextual. 411 U.S. at 802, 93 S. Ct. at 1824. To establish a prima facie case under the MWA, an employee must present evidence to show that (1) the employee engaged in statutorily protected conduct, (2) the employee suffered an adverse employment action, and (3) there is a causal connection between the adverse action and the employee's involvement in the statutorily protected conduct. *Coursolle*, 794 N.W.2d at 657.

The district court determined that Osland failed to show the existence of a genuine issue of material fact regarding a causal connection, and that, even if Osland could establish a prima facie case, he could not establish that the city's articulated reasons for its actions were pretextual. For purposes of this opinion, we assume that Osland engaged in protected conduct and that he suffered an adverse employment action.

I. Prima Facie Case of Causal Connection

Retaliatory motive may be established by circumstantial evidence. *See Cokley*, 623 N.W.2d at 632. But sheer speculation is not circumstantial evidence. *Id.* at 633. Osland argues that he offered evidence that would allow a reasonable juror, making all inferences in his favor, to find a causal connection between his conduct and the department's failure to promote him or place him in a detail position. That evidence is (1) he continually engaged in protected activity, (2) he ranked fourth on the 2015 promotional exam list and others ranked above and below him were promoted or placed in detail positions, (3) he performed his duties exceptionally well, and (4) a member of the executive team¹ had animus toward him that was known throughout the department. We address each argument in turn.

Continual Engagement in Protected Activity

Osland contends that his continual engagement in protected activity supports a reasonable inference of retaliation. He argues that he “was a squeaky wheel that continually needed oiling,” and that a reasonable juror could infer that the department’s “need to repeatedly spend time and resources on Osland’s complaint” played a role in the executive team’s decision to deny him a promotion.

¹ The executive hiring team consists of the police chief, assistant chief, three deputy chiefs, the chief financial officer, and the community engagement coordinator. When making promotion decisions, the executive team considers a candidate’s previous work experience, leadership ability, personality, and the needs of the position. The chief of police makes the final promotion decision.

Osland relies on *Eliserio v. United Steelworkers of Am. Local 310* to support his argument. 398 F.3d 1071, 1079 (8th Cir. 2005). In *Eliserio*, the Eighth Circuit determined that a reasonable jury could infer that the employer's attempt to remove an employee from a position was motivated by the employer's "desire to avoid the drain on his time caused by [the employee's] continuing complaints of racial harassment." *Id.* Notably, the employer in *Eliserio* admitted that he was forced to devote significant time to investigating and attempting to remedy the complaints. *Id.*

Eliserio is distinguishable because Olsand has not provided evidence that anyone in the department was concerned about the impact of Osland's complaints on the department. Osland's participation in protected activity, by itself, could support an inference of causation if "the employer has actual or imputed knowledge of the protected activity *and* the adverse employment action follows closely in time." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 445 (Minn. 1983) (emphasis added). But unless the adverse action occurred "very close" in time, mere temporal proximity does not create a genuine issue of fact regarding causation. *Compare Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 1511 (2001) (holding 20-month period between filing of discrimination complaint and alleged adverse employment action does not suggest causality to show prima facie case of retaliation under Title VII), *and Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695, 697 (8th Cir. 2006) (determining three-week time period insufficient

to establish causation),² *with Hubbard*, 330 N.W.2d at 445 (concluding that two days' time between protected activity and termination created inference of retaliation).

While Osland has produced evidence that some members of the executive team were aware of his participation in protected activity, his protected activity did not occur in close temporal proximity to the department's promotion decisions. Nearly all of Osland's protected activity occurred from 2007 through early 2015, and the department's promotion decisions were made in September 2015, April 2016, and August 2016. Osland also filed a complaint with human resources in December 2015, but even this conduct occurred four to eight months before the department's next promotion decisions in April and August 2016 and its detail-assignment decisions in May and August 2016.

Although the department placed two sergeants in detail positions on December 20, 2015, and in some circumstances, a ten-day time span may support a causal inference, it is not sufficient to create a genuine issue of material fact on retaliatory motive given the evidence in the record on detail-assignment decisions. Rather than performance on the promotional exam, the department considers a candidate's availability, previous work experience and training, and the ease of moving someone into a detail position. Osland has not produced evidence that his experience and availability suited the detail positions. Viewing the evidence in the light most favorable to Osland, the district court did not err in

² We rely on federal cases as persuasive authority, and note that the Minnesota Supreme Court has previously relied on federal cases construing the federal whistleblower act when interpreting the MWA. *See Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002) (citing federal cases interpreting the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C.) to interpret the MWA).

determining that Osland's involvement in protected conduct from 2007-2015 was insufficient to support an inference of a causal connection to later promotion and detail decisions.

Exam List

A sergeant with a bachelor's degree and five years of experience, including two years of supervisory experience and one year of investigative experience was eligible to take the 2015 lieutenant's exam, which consisted of a written exam and role-playing exercise. The exam was administered by an outside consulting firm. The executive team was provided a list of the top-scoring candidates according to the "rule of three," which requires consideration of two more candidates than the number of open positions. Therefore, for a single open position, the executive team considered the three highest-ranked candidates. For two positions, the executive team considered the four highest-ranked candidates. Candidates considered by the executive team completed a written interview.

Osland took the lieutenant's exam four times and scored high enough to be eligible for promotion in 2005, 2013, and 2015. He placed fourth on the 2015 exam but was not promoted. Osland argues that the department's decision to promote candidates ranked below him on the exam list supports an inference that his protected activity played a role in the department's decision not to promote him. We disagree. Osland presented no evidence that, aside from developing the list of names forwarded to the executive team and police chief, the specific ranking of candidates impacts decisionmaking for permanent promotions. And as noted above, Osland has not produced evidence that the department

relies on a candidate's exam ranking when assigning detail positions. Osland's theory is speculative and does not show a genuine issue of fact on a causal connection.

Osland's Qualifications

Osland next argues that the department's failure to promote him to a permanent lieutenant position or assign him to a temporary detail, despite his qualifications, supports an inference of retaliation. Although evidence in the record supports Osland's assertion that he was qualified, it is undisputed that other candidates were as well. And general qualifications are but one factor for detail assignments, which are filled by taking into account specific qualifications of available candidates and the goal of minimizing disruption within the department. Osland's general qualifications, considered in a vacuum, do not create a genuine issue of material fact that the department was motivated by his engagement in protected activity when it decided not to promote him or assign him to a detail.

Animosity

Osland contends that the record supports an inference that his former supervisor, who later became assistant chief and served on the executive team, prevented the team from fairly considering Osland's promotion application because of personal animosity against Osland stemming from his 2007 complaint against her. Osland cites *Malin v. Hospira, Inc.* to support his argument. 762 F.3d 552, 560 (7th Cir. 2014). In *Malin*, an employee was repeatedly denied promotions after making a complaint against the hiring supervisor. *Id.* The Seventh Circuit determined that the evidence permitted an inference that the hiring supervisor "had a long memory and repeatedly retaliated against" the

employee, despite the employee's "immediate supervisors repeatedly [informing] her that she would be an excellent fit for newly-available positions at higher salary grades and that they would recommend that she be promoted into them." *Id.* The Seventh Circuit concluded that there was "ample evidence" to support the inference of retaliation. *Id.* at 559.

Osland argues that a jury could conclude that his former supervisor similarly had a long memory and repeatedly retaliated against him like the supervisor in *Malin*. But unlike the employee in *Malin*, none of Osland's supervisors actively recommended him for promotion, and Osland has not provided "ample evidence" to support an inference that his supervisor's purported animosity from a 2007 complaint played a role in later promotion decisions. The record is devoid of evidence that the former supervisor made disparaging comments other than a statement that she disliked being the subject of a complaint or that the supervisor discussed Osland outside of the promotion-selection meeting. Although the former supervisor stated in an executive team meeting that Osland was a mediocre investigator, the observation was in response to a specific question about Osland's performance and was supported by identified deficiencies noted in Osland's investigations. Viewing the evidence in the light most favorable to Osland, the district court did not err in concluding that Osland has not shown a genuine issue of material fact as to whether a former supervisor's displeasure at being accused of discriminatory conduct supports a *prima facie* causal connection to the decision not to promote him.

Because Osland has not demonstrated a genuine issue of material fact with respect to causal connection, Osland cannot establish a *prima facie* case of retaliation under Minn.

Stat. § 181.932, subd. 1. We therefore conclude that the district court did not err by granting the department's motion for summary judgment, and we do not reach the question whether the articulated reasons for promotion decisions were pretextual.

Affirmed.