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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2112**

Tami Conn,
Appellant,

vs.

Bic Graphic USA Manufacturing Co., Inc.,
Respondent.

**Filed September 23, 2019
Affirmed
Ross, Judge**

Brown County District Court
File No. 08-CV-17-766

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(for appellant)

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(for respondent)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Kalitowski,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Bic Graphic USA Manufacturing Co., Inc., terminated Tami Conn's employment two years after she suffered a workplace injury that rendered her physically unable to perform the duties of her job. Conn sued Bic Graphic under the Minnesota Workers' Compensation Act and the Minnesota Human Rights Act, alleging that Bic discharged her for retaliatory and discriminatory reasons. The district court granted summary judgment in Bic's favor. Because the evidence construed in Conn's favor does not support any of her claims, we affirm.

FACTS

The facts as presented here are either undisputed or are disputed but construed in the light most favorable to Conn's lawsuit. Conn was working as a machine operator at Bic Graphic's calendar-production plant in February 2014. The position required extensive, repetitive arm movements above the head. Conn hoisted a bundle of calendars onto a machine that jolted upward, yanking her right arm and pulling it "almost out of the socket." Conn reported the incident to her supervisor and sought medical attention.

A Bic employee helped Conn apply for workers' compensation benefits, which covered all of Conn's medical expenses. An orthopedist diagnosed Conn's injury as a torn right rotator cuff and torn labrum, requiring surgery and restricting Conn from working more than four-hour days and from making repetitive movements. Conn worked under those restrictions for about five months. This meant that she had to serve as a "miscellaneous assembly operator," which was a seasonal position that entailed

intermittently stuffing envelopes and operating various machinery. Conn had surgery in September 2014. Recovery kept her home six months, during which period she received workers' compensation benefits.

Conn returned to work under a medical, no-machine-operation, and four-hour-workday restriction. Conn continued to suffer shoulder pain. She sought a second medical opinion, and her workers' compensation benefits covered the cost of her examination by Dr. Jesse Botker. Dr. Botker recommended a second shoulder surgery, which Conn had in July 2015. She spent the following six months home from work, a period that was again covered by workers' compensation benefits.

When Conn returned to work, Bic assigned her to temporarily available, nonmachinery table work. Conn continued to suffer pain. Dr. Botker concluded in March 2016 that Conn had reached maximum medical improvement. He imposed permanent work restrictions incompatible with the duties of the "miscellaneous assembly operator" position. The restrictions prohibited Conn from reaching above her shoulder more than 200 times per day; some of Bic's machines required more than 400 repetitions per hour. Operating the machines was an essential function of Conn's position. Conn worked solely on the tables until June 2016. That month, her benefits for total temporary disability expired. Bic informed Conn that it had no position within her medical restrictions, and it terminated her employment.

Conn successfully applied for a retail job paying \$10 per hour and then another for \$11 per hour, down from her \$13.96 hourly wage at Bic.

Conn sued Bic, alleging violations of the Minnesota Workers' Compensation Act (MWCA) and the Minnesota Human Rights Act (MHRA). The district court granted summary judgment to Bic. Conn appeals.

D E C I S I O N

Conn argues that the district court erroneously granted summary judgment. We review summary judgment decisions *de novo*, determining whether any genuine issues of material fact preclude summary judgment and whether the district court erred in its application of the law. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 227 (Minn. 2019). A district court must grant summary judgment when the evidence shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. Conn raises six issues on appeal. She argues that the district court made two legal errors by holding that her MHRA claims were precluded by the MWCA's exclusive-remedy provision and that she was not entitled to an interactive process to identify a reasonable accommodation under the MHRA. She argues also that the district court erred by concluding that her evidence did not raise a genuine issue of material fact that Bic retaliated against her for seeking workers' compensation benefits, refused to offer her available employment, failed to provide a reasonable accommodation, and retaliated against her for requesting reasonable accommodations. Although the district court did make one legal error, our *de novo* review leads us to affirm because Conn failed to produce evidence supporting every element of her claims.

I

We agree with Conn’s contention that the district court erred by concluding that her MHRA claims are precluded by the MWCA’s exclusive-remedy provision. We interpret the meaning of statutes de novo. *J.D. Donovan, Inc. v. Dep’t of Transp.*, 878 N.W.2d 1, 4 (Minn. 2016). The MWCA provides, “The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee” Minn. Stat. § 176.031 (2018). The district court construed this language in accordance with the supreme court’s decision in *Karst v. F.C. Hayer Co. Inc.*, 447 N.W.2d 180 (Minn. 1989), which held that the MWCA’s exclusivity provision precludes an injured employee’s separate action for disability discrimination under the MHRA. *Karst*, 447 N.W.2d at 186. The supreme court has recently overruled *Karst*, however, holding that the MWCA’s exclusivity provision does not apply to MHRA discrimination claims because an MHRA claim is based not on the employee’s work-related injury but on the employer’s illegal response to it. *Daniel v. City of Minneapolis*, 923 N.W.2d 637, 653 (Minn. 2019). The district court decided summary judgment in this case before the supreme court issued its opinion in *Daniel*, and it was of course unaware of the eventual change in the law. But because the *Daniel* holding is binding, the district court’s conclusion that Conn’s MHRA claims were barred cannot stand.

II

Conn argues that she is entitled to a trial on her claim that Bic terminated her employment to retaliate for seeking workers’ compensation benefits. See Minn. Stat. § 176.82, subd. 1 (2018). The only evidence Conn presented to support this claim is that

she was fired after her workers' compensation benefits expired. The legal problem with Conn's argument is that the statute prohibits an employer from retaliating for an employee's "*seeking* workers' compensation benefits," not for her *exhausting* workers' compensation benefits. *Id.* (emphasis added). The factual problem with the argument is that, not only has Conn identified no evidence from which a fact-finder could conclude that Bic retaliated against her for her effort to obtain benefits, the undisputed evidence indicates that Bic personnel encouraged Conn to apply for those benefits and then actively participated in helping her secure them. This corroborates Bic's argument and undisputed evidence that it acted in a consistently supportive rather than retaliatory manner in responding to Conn's desire to obtain the benefits.

III

Conn argues that Bic violated the MWCA by refusing to offer her continued employment. "An employer who, without reasonable cause, refuses to offer continued employment to its employee when employment is available within the employee's physical limitations shall be liable in a civil action for one year's wages." Minn. Stat. § 176.82, subd. 2 (2018). Conn could therefore avoid summary judgment only if she presented evidence that, among other things, supported a finding that Bic could employ her in a position that met her physical limitations. She did not. The undisputed evidence demonstrated that the only employment Bic had available required repetitive movements that far exceeded Conn's medical restrictions. Although Conn insisted that she could have performed the work despite those restrictions, under the Americans with Disabilities Act, an employer may rely on the work restrictions defined by the employee's physician.

See *McBee*, 925 N.W.2d at 232. Likewise under the MWCA, professional judgments of medical professionals are presumptively valid. *Smith v. Carver County*, 931 N.W.2d 390, 397 (Minn. 2019). The district court properly granted summary judgment because of Conn’s failure to identify jobs she could perform.

We are not persuaded otherwise by Conn’s contention that she could have performed alternative jobs with accommodations or that she could have worked solely on the tables. The evidence reveals that most of the nonmachinery work that Bic assigned to Conn was seasonal and not consistently available. It also reveals that, to reduce the burden of repetitive motion on all its employees, Bic spread that work among multiple employees. Dedicating a single worker to those duties would therefore have made them unavailable for other employees. That creates two problems. First, dedicating the work to Conn exclusively so as to reduce her shoulder strain from repetitive-motion activity would entail creating an entirely new position for Conn. Second, shifting the burden of repetitive-motion activity away from Conn would also require Bic to alter the duties of multiple other workers, increasing their repetitive-motion activity and making their jobs more onerous. The MWCA does not require employers to create new jobs or alter existing jobs.

IV

Conn’s MHRA disability-discrimination claim fares no better than her MWCA claim. The MHRA prohibits an employer from engaging in adverse employment actions because an employee is a disabled person. Minn. Stat. § 363A.02, subd. 1(1) (2018). “A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment;

or (3) is regarded as having such an impairment.” Minn. Stat. § 363A.03, subd. 12 (2018). Conn argues that she is disabled because her impairment materially limits her in the major life activities of lifting, reaching, and working. Her argument fails both on the facts and the law.

As a matter of law, Conn does not defend her assertion that lifting and reaching are “major life activities.” See *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 553–54 (Minn. App. 2005) (reciting the federal definition of major life activities as those “of central importance to daily life” and holding that walking and seeing are major life activities). Even assuming they are major life activities, as a matter of fact, Conn’s testimony defeats her argument as to lifting and reaching. A major life activity is materially limited when it is “greatly impeded.” *Sigurdson v. Carl Bolander & Sons Co.*, 532 N.W.2d 225, 228–29 (Minn. 1995). Conn identifies no evidence of great impediment to her lifting and reaching, and she identifies no major life activity that her restrictions impede. She testified instead that her injury does not prevent her from doing any activity that she wants to do. Her only lifting and reaching restrictions are those defined in her work restrictions. Those restrictions do not preclude her from pushing and pulling 40-pound objects up to 200 times daily, reaching above her head 200 times daily, lifting 5 pounds overhead 30 times daily, or lifting 20 pounds from the floor to her waist 30 times daily. Although her physically demanding position at Bic required more onerous activity than these capabilities, Conn identified no major life activity that requires more.

Conn’s argument that she is materially limited in the major life activity of work also lacks evidentiary support. A plaintiff’s capability to work is materially limited if she is

disqualified from a significant number and type of jobs when accounting for the geographic area to which she has reasonable access, her job expectations, and her training. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 (Minn. 2001). Conn presented no evidence that she is disqualified from any job other than one as a Bic machine worker. She therefore did not raise a genuine issue of material fact as to whether she is disabled based on the major life activity of work.

She also failed to identify any evidence that she has a record of a disability or that Bic perceived her as having one. She points only to Bic's recognition that her permanent work restrictions prevented her from performing the repetitive-motion tasks necessary for her job at Bic. But this falls short of creating a genuine issue of material fact as to whether Bic viewed her as being materially limited in the much broader category of participating in a major life activity.

Conn offered insufficient evidence to avoid summary judgment on her disability-discrimination claim.

V

Conn does not argue convincingly that she was entitled to an interactive process to determine a reasonable accommodation for her injury. The MHRA does not obligate an employer to engage in an interactive, accommodation-seeking process. *McBee*, 925 N.W.2d at 229 (“[A]n interactive process is not . . . an affirmative statutory obligation.”). And in any event, again, Conn failed to present evidence that she is a disabled person. She therefore has no factual basis to support a claim on the theory that Bic engaged in an unfair employment practice by not reasonably accommodating the disability of a qualified

disabled person. *See* Minn. Stat. § 363A.08, subd. 6(a) (2018). She cannot establish that Bic was obligated to offer her any accommodation. And her suggestion that allowing her to continue working at the tables constitutes an obligatory, reasonable accommodation also fails as a matter of law because an employer is not required “to create a new, one-person job category independent of both the work hours and the job rotation schedule required of all other production employees.” *Helgersen v. Bridon Cordage, Inc.*, 518 N.W.2d 869, 872 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). In sum, no reasonable accommodation was either identified or required.

VI

For these same reasons, we reject Conn’s argument that the district court erroneously granted summary judgment on her theory that Bic retaliated against her for requesting a reasonable accommodation. An employer must not retaliate against an employee for seeking accommodations for her disability. Minn. Stat. § 363A.15 (2018). Conn has not shown that she is disabled. Separately, she also testified that she never requested an accommodation. Summary judgment on Conn’s reprisal claim is also appropriate.

Affirmed.