

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0014**

Charity Slaughter,
Appellant,

vs.

Independent School District No. 833,
Respondent.

**Filed August 10, 2020
Affirmed
Larkin, Judge**

Washington County District Court
File No. 82-CV-18-3507

Leslie L. Lienemann, Celeste E. Culberth, Culberth & Lienemann, LLP, St. Paul,
Minnesota (for appellant)

Michael J. Waldspurger, Kristin C. Nierengarten, Rupp, Anderson, Squires &
Waldspurger, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and
Schellhas, Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's summary dismissal of her retaliatory-discharge claims against respondent school district under the Minnesota Whistleblower Act (MWA) and Minnesota Occupational Safety and Health Act (MOSHA). We affirm.

FACTS

In the summer of 2014, respondent Independent School District No. 833 (the district) hired appellant Charity Slaughter as a custodian at Pine Hill Elementary School. During the summer, Slaughter worked daytime hours, but during the school year she worked a night shift. Shortly after she began working for the district in the summer of 2014, Slaughter believed that a school foreman was intoxicated at work after she observed him drinking in a school parking lot and exhibiting indicia of intoxication. She reported her concerns about the foreman to her supervisor. The district confirmed Slaughter's report that the foreman was intoxicated at work, sent him home, and eventually discharged him.

Later, on September 16, 2014, Slaughter emailed all of the staff at Pine Hill and told them that she was "struggling to complete all of [her] tasks" by the end of her shift and to vacuum classroom rugs daily. Slaughter stated that she would instead vacuum classroom rugs twice a week. On September 17, Slaughter's supervisor responded to Slaughter's email stating, "I need to see you in my office Thursday 8:00 a.m., we need to have a discussion."

On September 18, Slaughter's supervisor discharged her. On September 25, another district employee overruled the discharge decision and placed Slaughter on paid

administrative leave effective September 18. On October 6, the district removed Slaughter from paid administrative leave and reinstated her as a custodian at another elementary school. In August 2015, the district transferred Slaughter back to Pine Hill.

In 2017, Slaughter left notes for teachers in classrooms regarding building issues, including notes encouraging teachers to flush classroom toilets before they left for the day. In September 2017, the school's principal told Slaughter not to leave such notes and to contact only the principal or the district's facilities supervisor if she had any building- or teacher-related issues. That same month, the principal told Slaughter several times not to lock the school's interior fire doors before 5:00 p.m. Nonetheless, Slaughter continued to lock those doors around 4:00 p.m. On September 29, 2017, the district placed Slaughter on administrative leave based on allegations that, contrary to the directives from the principal, she left notes for teachers in classrooms and locked the school's fire doors before 5:00 p.m.

On October 6, the Minnesota Department of Labor and Industry received a MOSHA complaint from Slaughter regarding lead levels in the water at Pine Hill, air-quality issues at the school, and the safety and security of the school building. On October 9, the department notified the district that it had received a complaint regarding "[p]oor indoor air quality" at Pine Hill. The department's notice to the district did not identify the complainant.

On October 25, the district interviewed Slaughter as part of its investigation of the allegations underlying her administrative leave. During the interview, Slaughter admitted that although the principal had told her not to lock the school's fire doors before 5:00 p.m.,

she had continued to do so. Slaughter also admitted that she had hidden a vacuum that the principal had reserved for staff use because she disagreed with staff use of the vacuum. In explaining why she disobeyed the principal's directives, Slaughter stated, "[Y]our title means nothing to me. I don't care who you are. A directive, if given to me, I will follow, unless it goes against me personally, goes against my job or goes against my safety." Slaughter acknowledged that the district's human-resources director (HR director) asked her if she had her keys with her when he placed her on administrative leave. Slaughter admitted that although she had her keys, she chose to lie and say they were at home. Slaughter explained that she lied to see if the HR director would "call [her] out on it" and to "prove a point."

On October 30, the district discharged Slaughter. In a letter dated October 30, 2017, the district notified Slaughter of her discharge and provided the following grounds: (1) directly contacting teachers regarding building issues after being directed not to do so, (2) taking a vacuum from the staff lounge and hiding it in a locked storage room because of a disagreement regarding classroom rugs, (3) failing to vacuum on six days in September 2017 and telling a staff member that she was not vacuuming to "prove a point," (4) locking fire doors before 5:00 p.m. after the principal directed her several times not to do so, (5) violating the applicable dress-code policy, (6) lying to the HR director about not having her keys when he placed her on paid administrative leave, and (7) being disrespectful to the principal.

In July 2018, Slaughter sued the district, asserting claims of retaliatory discharge in violation of the MWA and MOSHA. Slaughter alleged that throughout her employment

with the district she reported “concerns about illegal levels of lead in the school’s drinking water” and “unsafe airborne mold and pollutants in the school” and that she repeatedly raised safety concerns with the principal regarding the importance of locking the school’s fire doors at 4:00 p.m. Slaughter alleged that the district terminated her employment because she made those reports and because she refused to perform tasks in an unsafe environment.

The district court granted summary judgment for the district and dismissed Slaughter’s claims, reasoning that Slaughter had failed to establish a prima facie case of retaliation under the MWA or MOSHA. Slaughter appeals.

D E C I S I O N

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). No genuine issue of material fact exists “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.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (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).

“Summary judgment is a blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 232 (Minn. 2020) (quotations omitted). But “the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *DLH, Inc.*, 566 N.W.2d at 70.

An appellate court reviews a district court’s grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). “We view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law.” *Id.*

I.

Slaughter contends that the district court erred by granting summary judgment for the district on her retaliation claim under the MWA.¹

The MWA provides,

An employer shall not discharge, discipline, threaten,
otherwise discriminate against, or penalize an employee

¹ Slaughter assigns error to several aspects of the district court’s reasoning, including that the court “erroneously required proof of an actual violation of law under the Minnesota Whistleblower Act” and “improperly weighed evidence of causation.” Because our standard of review is de novo, we do not address those assertions of error. *See Wheeler v. State*, 909 N.W.2d 558, 563 (Minn. 2018) (“Under the de novo standard, we do not defer to the analysis of the courts below, but instead we exercise independent review.”).

regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common 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) (2018).

Minnesota courts use the burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), to determine whether summary judgment is appropriate on a claim of retaliation under the MWA. *Moore v. City of New Brighton*, 932 N.W.2d 317, 323 (Minn. App. 2019), review denied (Minn. Oct. 15, 2019).

Under the *McDonnell Douglas* test, an employee must present a prima facie case of (1) statutorily protected conduct by the employee, (2) an adverse employment action by the employer, and (3) a causal connection between the two. *Id.* “If the employee fails to meet any of these elements, summary judgment in the employer’s favor is appropriate.” *Id.* “But if the employee presents evidence establishing a prima facie case, the burden then shifts to the employer, whose summary-judgment motion should fail unless it provides a legitimate, nonretaliatory reason for its challenged adverse employment action.” *Id.* at 323-24. If the employer meets this burden, “the burden shifts back to the employee, who can then avoid summary judgment only by producing evidence that would allow a reasonable trier of fact to find that the employer’s stated reason for the allegedly adverse action was more likely than not merely a pretext for retaliation.” *Id.* at 324.

A whistleblower claim need not identify the specific law or rule that the employee suspects has been 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, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.

Abraham v. County of Hennepin, 639 N.W.2d 342, 354-55 (Minn. 2002).

However, a plaintiff must identify the relevant legal violation to avoid summary judgment and show facts that, if true, would prove a violation. *See Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555-56 (Minn. App. 2005) (affirming summary-judgment dismissal of whistleblower claim in part because plaintiff failed to satisfy her “burden to demonstrate that the suspected misconduct implicated a violation of law”). “[A] mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected conduct under the Whistleblower Act.” *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 22 (Minn. 2009).

Statutorily Protected Conduct

Slaughter argues that she engaged in statutorily protected conduct under the MWA in four ways: (1) by objecting to and refusing to follow the principal's directive not to lock the school's interior fire doors before 5:00 p.m., (2) by informing supervisors that a foreman was intoxicated at Pine Hill in 2014, (3) by reporting air- and water-quality concerns at the school in 2016 and 2017, and (4) by reporting that exterior doors at the school were propped open during school hours.

We first consider Slaughter's refusal to obey the principal's directive not to lock the school's fire doors before 5:00 p.m. Slaughter argues that her “reports to [the principal]

and her superiors in the District that she believed leaving the fire doors open presented a foreseeable hazard to her safety and to the safety of others in the building, were reports of a suspected violation of the common law.” She argues that “her refusal to obey an order to leave the fire doors open” was similarly protected conduct.

Slaughter testified in her deposition that the school’s principal directed her not to lock the fire doors before 5:00 p.m. Slaughter testified that she disobeyed that directive and locked the fire doors at around 4:00 p.m. because she had safety concerns about “unknown occupants in the building with unknown intentions” and noticed that problem “started way before 5:00 and [she] needed to do what [she] could to make sure [her] safety was protected [as was] the safety of others.” Slaughter identified two specific incidents that caused her to feel in danger at the school: a man approached her in the parking lot behind the school and she encountered someone in the school’s resource room at around 10:15 p.m. Slaughter testified that the person she encountered in the school’s resource room said he had keys to the school, that she reported the incident to the district’s facilities supervisor, and that the facilities supervisor told her to leave the building.

Slaughter’s theory seems to be that the district breached a common-law duty to use reasonable care for the safety of all entrants by locking the fire doors at 5:00 p.m. and not at 4:00 p.m.² We fail to discern how either of the incidents on which Slaughter relies could

² To succeed on a common-law negligence claim, a plaintiff must prove: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty was a proximate cause of the injury. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). “A landowner generally has a continuing duty to use reasonable care for the safety of all entrants.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotation omitted).

lead a reasonable person to find for Slaughter. The record simply does not support a conclusion that locking the fire doors one hour earlier would have prevented either incident.

Once again, a MWA plaintiff must identify the relevant legal violation to avoid summary judgment and show facts that, if true, would prove that violation. *See Gee*, 700 N.W.2d at 555-56. The only record evidence supporting the district's alleged breach of a common-law duty to use reasonable care for the safety of all entrants is Slaughter's personal opinion that the fire doors should have been locked at 4:00 p.m. and not at 5:00 p.m. Slaughter's opinion regarding the impact of the one-hour delay is not sufficiently probative to permit reasonable persons to draw different conclusions regarding the alleged breach. Because no reasonable person could find that Slaughter's reports to the district regarding the fire doors implicated a violation of common law, Slaughter has failed to establish a prima facie case showing that either her reports or her disobedience of the principal's directive was statutorily protected conduct under the MWA.

We next consider Slaughter's reports regarding the intoxicated foreman, air- and water-quality concerns, and the propped-open exterior doors. Those reports appear to implicate potential violations of law or rule adopted pursuant to law and therefore might constitute statutorily protected conduct.³ *See, e.g.*, Minn. Stat. §§ 121A.335 (Supp. 2017)

We assume without deciding that a landowner's failure to satisfy that duty can constitute a violation of law supporting an MWA claim.

³ Propping open exterior doors during school hours is contrary to district policy, under which all exterior school doors must be locked from 15 minutes after the start of the school day to the end of the school day.

(regulating testing of lead content in school drinking water), .9501-.9512 (2016) (regulating lead content of water), 116.01-.994 (2016) (establishing Minnesota Pollution Control Agency), 624.701, subd. 1 (2012) (criminalizing the introduction or possession of an alcoholic beverage on the grounds of a public elementary school). However, we need not decide that issue because, as explained below, Slaughter has failed to establish a prima facie case of a causal connection between those reports and her discharge. We therefore assume without deciding that those reports constitute statutorily protected conduct.

Causal Connection

A plaintiff can demonstrate a causal connection between statutorily protected conduct and an adverse employment action by showing that the employer had actual or imputed knowledge of the protected activity and that the adverse employment action followed closely in time. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444-45 (Minn. 1983); *see also Cokley v. City of Otsego*, 623 N.W.2d 625, 633 (Minn. App. 2001) (stating that close proximity between an employee engaging in protected conduct and a termination decision supports an inference of reprisal), *review denied* (Minn. May 15, 2001). Slaughter generally argues that “causation may be shown by the close proximity in time between protected conduct and adverse action” and that there was “proximity in time between the protected conduct and the termination” here. However, “the presence of intervening events undermines any causal inference that a reasonable person might otherwise have drawn from temporal proximity.” *Freeman v. Ace Tel. Ass’n*, 467 F.3d 695, 698 (8th Cir. 2006).

Slaughter argues that the district discharged her in 2014 because of her report regarding the intoxicated foreman. Slaughter's intervening September 16, 2014, all-staff email undermines any causal inference that a reasonable person might have otherwise drawn from the temporal proximity of Slaughter's report regarding the intoxicated foreman and her discharge. *See id.* And although Slaughter argues that the deposition testimony of the principal and Slaughter's former custodial supervisor are inconsistent regarding the reasons for her 2014 discharge, she does not provide a basis for her assertion that the district discharged her because of her report other than temporal proximity.

Moreover, it is undisputed that the district discharged the foreman after confirming Slaughter's report regarding his conduct. Thus, the undisputed record indicates that the district responded to Slaughter's report in a manner consistent with the concern she had raised. On this record, we fail to discern how a rational factfinder could conclude that Slaughter was discharged in 2014 because she reported the intoxicated foreman to her supervisor. Thus, Slaughter has failed to establish a *prima facie* case showing a causal connection between her report regarding the intoxicated foreman and her 2014 discharge.

Slaughter argues that the district discharged her in 2017 in part because of her reports regarding poor air and water quality at the school, as well as her reports that exterior doors had been propped open during school hours. Slaughter testified in her deposition that she reported concerns about the school's air and water quality to supervisors several times in 2016 and 2017. When the district's counsel asked Slaughter why she believed her reports of air- and water-quality concerns caused her discharge, she testified that she was vocal about those concerns and that any time she brought up a new concern "it was met

with resistance and unwillingness to communicate about it.” Slaughter testified that she made reports regarding outside doors being propped open in the spring of 2016. Slaughter also noted in a daily shift report on September 28, 2017, that staff at the school were propping open exterior doors.

Although Slaughter’s discharge on October 30, 2017, was close in time to some of Slaughter’s reports regarding air and water quality and the propped-open exterior doors, there was a relevant intervening event: the October 25, 2017, investigative interview regarding the allegations that resulted in Slaughter’s administrative leave. During that interview, Slaughter admitted that she had purposely disobeyed directives from the school’s principal regarding when to lock the school’s fire doors. Slaughter’s disobedience of the principal’s directive is material because district policy authorized the principal to determine how to secure doors after school hours, and it is undisputed that she had told Slaughter several times not to lock the fire doors before 5:00 p.m.

Slaughter’s damaging admissions in the October 25, 2017, interview, coupled with the district’s references to those admissions in its discharge letter, undermine any causal inference that a reasonable person might have otherwise drawn from the temporal proximity between Slaughter’s discharge and her reports regarding air and water quality and propped-open exterior doors. *See id.* And Slaughter provides no other basis on which to draw a causal inference between those reports and her 2017 discharge. On this record, no reasonable person could conclude that the district discharged Slaughter in 2017 because she reported air- and water-quality concerns and propped-open exterior doors, and not

because of her insubordination and deceit. Thus, Slaughter has failed to establish a prima facie case showing a causal connection between those reports and her 2017 discharge.

In sum, because Slaughter has failed to present evidence that creates a genuine issue of material fact regarding the necessary elements of her retaliatory-discharge claim under the MWA, summary judgment is appropriate.

II.

Slaughter contends that the district court erred by granting summary judgment for the district on her retaliation claim under MOSHA.

Minnesota courts use the *McDonnell Douglas* burden-shifting test to evaluate a claim of retaliatory discharge under MOSHA. *See Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 496 (Minn. App. 1996) (applying *McDonnell Douglas* standard to MOSHA retaliation claim in analyzing whether district court erred by denying motion for judgment notwithstanding the verdict); *see also Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 119 n.7 (Minn. 1991) (stating that the *McDonnell Douglas* test must be used in analyzing a retaliatory-discharge claim). Again, under the *McDonnell Douglas* test, an employee must present a prima facie case of (1) statutorily protected conduct by the employee, (2) an adverse employment action by the employer, and (3) a causal connection between the two. *Moore*, 932 N.W.2d at 323. “If the employee fails to meet any of these elements, summary judgment in the employer’s favor is appropriate.” *Id.*

Slaughter’s MOSHA claim is based on two different grounds under Minn. Stat. § 182.654 (2018). We address each ground in turn.

Retaliation for MOSHA Complaint

No employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of the employee or others of any right afforded by this chapter.

Minn. Stat. § 182.654, subd. 9.

Slaughter testified in her deposition that she submitted a complaint regarding air quality at Pine Hill to the Minnesota Department of Labor and Industry. A notice from the department to the district dated October 9, 2017, states that the department received a complaint on October 6, 2017, regarding “[p]oor indoor air quality” at Pine Hill. The parties do not dispute that Slaughter’s filing of the MOSHA complaint was statutorily protected conduct. Instead, they dispute whether the district knew that Slaughter filed the MOSHA complaint when it discharged her and whether there was a causal connection between the MOSHA complaint and Slaughter’s discharge. *See Wolf v. Berkley Inc.*, 938 F.2d 100, 103 (8th Cir. 1991) (stating that a causal relationship between statutorily protected activity and an employee’s discharge “does not exist if the employer is not aware of the employee’s statutorily protected activity”).

Slaughter argues that the district knew that she filed the MOSHA complaint because it “directly correlated with [her] emails and daily safety reports and followed closely in time.” Slaughter argues that the district “became aware of her formal complaint to MOSHA on October 9, 2017, just two weeks prior to telling her she could either quit or be fired.” Slaughter argues that the “timing of [her] termination relative to her complaints provides . . . evidence of causation.”

Even if the HR director was aware that Slaughter had filed the MOSHA complaint, the record lacks evidence showing that the HR director discharged her because she filed that complaint. Although Slaughter's filing of the complaint on October 6, 2017, was close in time to her discharge on October 30, there was a significant intervening event between those two dates: Slaughter's October 25 investigative interview, in which she admitted that she had intentionally disobeyed multiple directives from the school's principal and had lied to the HR director about her possession of keys to the school. That intervening event undermines Slaughter's proximity-based causation theory, and she provides no other basis for drawing a causal inference between the complaint and her 2017 discharge. Thus, Slaughter has failed to establish a prima facie case showing that there was a causal connection between the filing of her MOSHA complaint and her discharge.

Retaliation for Refusal to Perform an Assigned Task

An employee acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm to the employee.

A reasonable belief of imminent danger of death or serious physical harm includes but is not limited to a reasonable belief of the employee that the employee has been assigned to work in an unsafe or unhealthful manner with a hazardous substance, harmful physical agent or infectious agent.

An employer may not discriminate against an employee for a good faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected.

Minn. Stat. § 182.654, subd. 11.

To prevail on a MOSHA retaliation claim based on a refusal to perform an assigned task, an employee must prove (1) the employee, in good faith, refused to work under conditions which the employee reasonably believed presented an imminent danger of death or serious physical harm to the employee; (2) the employee requested that the employer correct the hazardous conditions but the conditions were not corrected; and (3) the employer discriminated against the employee for the employee's refusal to perform the assigned tasks. *Id.*

Slaughter argues that during the investigative interview on October 25, 2017, she “specifically said she felt a threat of immediate harm and gave examples of events that had occurred in the past in the [school] building that had placed her in jeopardy.” Slaughter argues that she “refused to perform an assigned task—leaving the doors open until 5:00” based on those safety concerns.

During the investigative interview, Slaughter stated that she locked the fire doors at 4:00 p.m. in direct contravention of the principal's directive because she was at the school alone and “there have been immediate threats in the building. There have been people found in the building.” She specifically mentioned being “approached by strange people in the building at 10 o'clock at night sometimes” and being “approached in the parking lot by someone.” It is unclear how locking the interior fire doors at 4:00 p.m. instead of at 5:00 p.m. would have affected either of those circumstances, and Slaughter does not point to any other evidence supporting her claim.

Slaughter argues that the “District has no evidence to suggest that [the] events” she identified as presenting safety concerns in the investigative interview “did not occur or that

[her] safety was not in jeopardy.” She argues that a “jury must determine whether [her] concerns of imminent harm were reasonable.” She mentions certain school shootings as support for her argument.

Under the *McDonnell Douglas* burden-shifting test, Slaughter must present a prima facie case of statutorily protected conduct to avoid summary judgment. *See Moore*, 932 N.W.2d at 323. In other words, Slaughter has the initial burden to establish a prima facie case that she reasonably believed that locking the doors at 5:00 p.m. instead of 4:00 p.m. presented an “imminent danger of death or serious physical harm.” *See Minn. Stat. § 182.654, subd. 11.* On this record, we fail to see how a rational factfinder could conclude that Slaughter’s belief was reasonable. Thus, Slaughter has failed to present a prima facie case of statutorily protected conduct.

In sum, because Slaughter has failed to present evidence that creates a genuine issue of material fact regarding the necessary elements of her claims under MOSHA, summary judgment is appropriate.

Affirmed.