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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0494**

Dr. Kimberly Finch,
Appellant,

vs.

Abbott Northwestern Hospital, et al.,
Respondents.

**Filed January 19, 2021
Affirmed in part, reversed in part, and remanded
Frisch, Judge**

Hennepin County District Court
File No. 27-CV-18-3271

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Minnesota (for appellant)

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Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court erred by dismissing her sex-discrimination and negligence claims for failure to state a claim upon which relief can be granted and by dismissing her reprisal claim on summary judgment. We affirm the dismissal of the sex-

discrimination and negligence claims, but we reverse the dismissal of the reprisal claim and remand for trial.

FACTS

Appellant Dr. Kimberly Finch sued respondents Abbott Northwestern Hospital and Allina Health System (collectively, Allina), alleging negligence and two violations of the Minnesota Human Rights Act (MHRA): sex discrimination in violation of Minn. Stat. § 363A.08, subd. 2(3) (2018), and reprisal in violation of Minn. Stat. § 363A.15 (2018). The district court dismissed the sex-discrimination and negligence counts for failure to state a claim upon which relief can be granted, *see* Minn. R. Civ. P. 12.02(e), and it later dismissed the reprisal claim on Allina's motion for summary judgment, *see* Minn. R. Civ. P. 56.01.

Rule 12.02(e) Proceedings and Order for Dismissal

We begin by summarizing the allegations set forth in Dr. Finch's complaint, which we accept as true for the purpose of reviewing the dismissal of the sex-discrimination and negligence claims. *See Wiegand v. Walser Auto. Grps., Inc.*, 683 N.W.2d 807, 811 (Minn. 2004).

In the spring of 2015, Dr. Finch began working at Abbott in its mental-health-services program. Allina paid Dr. Finch through its guaranteed-compensation plan, and she received a fixed rate of compensation regardless of her client-service hours. Allina commonly pays providers for one year using the guaranteed-compensation plan and then transitions providers to a productivity-based compensation plan.

Allina required Dr. Finch to work with Dr. Jeffrey Gottlieb to develop a mental-health-services training program. Dr. Gottlieb allegedly engaged in “highly sexualized conversations and tended to turn any conversation into sexual banter.” In September 2015, Meagan Abel began a practicum placement with Abbott as part of her doctorate program.¹ Dr. Gottlieb supervised Abel. Dr. Gottlieb allegedly fostered an environment rife with sexually inappropriate conversations, inappropriate racial remarks, and domineering shows of authority. Abel raised concerns about Dr. Gottlieb’s behavior with Dr. Finch and Dr. Finch’s supervisor, clinical director Dr. Michael Schmitz. By November 2015, Abel reported more specific instances of Dr. Gottlieb’s misconduct to Dr. Finch, and Dr. Finch passed that information to Dr. Schmitz. After Dr. Finch reported additional misconduct, Allina investigated Dr. Gottlieb, removed him from his training role, and ordered him to have no further contact with students.

On January 26, 2016, Dr. Finch filed a formal complaint regarding Dr. Gottlieb’s misconduct with the Minnesota Board of Psychology. One of Dr. Gottlieb’s colleagues, Dr. Rebecca Cook, allegedly told Dr. Finch, “[E]veryone will hate you for this. You will be sorry that you ever came to work here.” Dr. Finch reported this statement to Dr. Schmitz, who in turn told Dr. Finch to stop putting reports in writing and instead to report misconduct directly to him. Thereafter, Dr. Finch became concerned Allina was not addressing her reported concerns, so she sought a meeting in early June 2016 with Allina’s

¹ Dr. Finch and Abel initially filed a joint complaint in which Abel maintained several additional claims. The district court dismissed Abel’s claims, leading to a separate appeal that was recently decided by the supreme court. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58 (Minn. 2020).

vice president, Dr. Paul Goering, and Hilary Carruthers, another Allina executive. When Dr. Finch met with Dr. Goering and Carruthers, Dr. Finch described a harassing, discriminatory, and hostile work environment.

On June 17, 2016, Dr. Gottlieb resigned. Dr. Finch, however, continued to face workplace challenges. Dr. Cook allegedly told Dr. Finch that others perceived her as a snitch and did not trust her. Dr. Schmitz allegedly told Dr. Finch that she could apply for the then-open training-director position but that there was “no chance” she would get the position. In August 2016, Dr. Schmitz left Allina.

Dr. Finch claimed that she continued to face what she believed to be workplace hostility and intimidation and that Allina took no corrective action. After more than a year of raising concerns with her supervisors and seeing no improvements, on January 24, 2017, Dr. Finch gave notice of her resignation from Abbott, effective March 28, 2017. She secured a different position with Allina at the Courage Kenny Rehabilitation Institute (CKRI).

On July 14, 2017, Dr. Finch filed a charge with the Minnesota Department of Human Rights (MDHR) alleging workplace harassment, discrimination, and hostility. In December 2017, Dr. Finch learned that someone from Allina had warned CKRI staff that Dr. Finch was a “troublemaker.” And in January 2018, Dr. Finch learned that Carruthers had contacted CKRI management to disparage Dr. Finch. In February 2018, Dr. Finch filed her complaint in district court.

Allina moved to dismiss the entire complaint, arguing that Dr. Finch failed to state claims upon which relief could be granted. The district court granted the motion in part,

dismissing the sex-discrimination claim because Dr. Finch failed to allege sex discrimination occurring within the statutory limitations period and dismissing the negligence claim as preempted by the MHRA. *See* Minn. Stat. § 363A.04 (2018). The district court denied the motion to dismiss as to the reprisal claim.

Summary-Judgment Proceedings and Judgment of Dismissal

Following the completion of discovery on the reprisal claim, Allina moved for summary judgment, arguing that Dr. Finch could not establish a prima facie reprisal claim and that Abbott should be dismissed as a party because it was merely an assumed name of Allina. We summarize the summary-judgment record relevant to the issues on appeal.

Dr. Finch joined Abbott with the intention of working solely as a clinician, but she eventually undertook training duties in Abbott's mental-health-services program. Consistent with its common practice, Allina placed Dr. Finch on guaranteed compensation for her first year.² Early during her employment, Dr. Finch requested information regarding how she could increase her income.

On or about December 16, 2015, Abel told Dr. Finch about Dr. Gottlieb's misconduct. On December 17, Dr. Finch reported Abel's allegations to Dr. Schmitz via

² Guaranteed compensation is a fixed annual rate of pay that Allina frequently uses to pay doctors developing their client bases. But Allina most typically uses a productivity-based compensation structure, in which providers earn work-relative value units for different types of work. Doctors on guaranteed compensation who would have been paid more on a productivity basis are paid the difference, but only after they transition to productivity-based compensation. A provider or her supervisor may request that the provider be transitioned from guaranteed compensation to productivity-based compensation, and a separate compensation committee considers such requests.

email. Dr. Schmitz and human resources investigated and, on December 23, Dr. Schmitz relieved Dr. Gottlieb of supervisory responsibilities.

At Dr. Schmitz's request, Dr. Finch agreed to serve as the interim training director. In January 2016, Dr. Schmitz recommended that the duration of Dr. Finch's guaranteed compensation be extended from March 2016 through March 2017 because she undertook more administrative duties and reduced her clinical duties. Allina's compensation committee reported the approval of the recommendation specifically "to allow Dr. Finch to serve as interim director of the student-training program and to reflect the fact that she needed to commit additional time to supervising students (versus seeing patients)."

Dr. Finch testified that, after filing her complaint regarding Dr. Gottlieb with the Minnesota Board of Psychology, she faced severe, negative reactions at Abbott:

[Dr.] Cook would come in my office and say that I was a terrible person, that I should never have reported Gottlieb . . . [that] I just needed to shut the f-ck up and leave it alone, that I needed to not complain about anything and not be unwilling to be on the training committee because . . . Allina owns you.

And so the first year or when you're on guarantee, you need to bend over and take it up the a-s and not complain about anything. And she would call me wicked and unsafe. She would say I would regret that I had ever come to work there, that she would make sure that I was suffering, that I did not get referrals and that no one liked me.

Dr. Finch claimed that she told Dr. Schmitz about Dr. Cook's behavior but that Dr. Schmitz failed to intervene. Dr. Finch also testified that the patient scheduler began diverting new patients away from Dr. Finch.

Dr. Finch claims that, throughout spring 2016, she continued to report information about “discrimination, harassment, and retaliation.” On June 9, 2016, Dr. Finch emailed Dr. Schmitz and informed him that Dr. Gottlieb had a closed-door meeting with a student. Dr. Schmitz and human resources met with Dr. Gottlieb the next day. Dr. Gottlieb then submitted a 60-day notice of resignation, but Allina did not have him work the remainder of the notice period.

On June 13, 2016, Dr. Finch sought a meeting with Dr. Goering, Carruthers, and another manager to discuss, in part, “the current status of the students, myself, Dr. Schmitz, Dr. Gottlieb and the pending Board of Psychology Complaints.” She informed Dr. Goering and Carruthers, “I would like to provide you with a full and accurate timeline of events and discuss significant concerns I have related to the management of this situation.”

On June 15, 2016, Dr. Goering and Carruthers met with Dr. Finch. Dr. Finch provided a written agenda noting “Areas of Concern” which, under a heading labeled “Isolating Messages around Communication/Fear of Retaliation,” included the following:

- Interested in containment of information
- Actively discouraged communicating concerns to other members of the leadership team
- Created a sense of intimidation and disapproval about communicating concerns or problems that cast the clinic environment or training program in a negative light.
- Mismatch between written communication/email and verbal conversations
- Use of negative, stigmatizing language to describe students and minimize the impact of their experiences
- Use of negative language to describe co-workers, fellow clinic staff

The parties dispute the substance of the discussions during the meeting. Carruthers testified that they did not discuss the topic, “Fear of Retaliation,” and that Dr. Finch did not report any discrimination, harassment, or retaliation at that time. Dr. Finch testified that the very purpose of the meeting was to report to Allina senior management the retaliation, harassment, and discrimination that she experienced and that she specifically informed Allina leaders at the meeting that she was “afraid of [her] supervisor.”

On July 15, 2016, Dr. Schmitz emailed Carruthers and identified two candidates to fill the permanent training-director position: Dr. Finch and a colleague. On August 3, 2016, Dr. Schmitz emailed Allina’s training committee—which included Dr. Finch and the colleague—and indicated that members were free to apply for the training-director position. Dr. Finch alleged that she wanted the position but did not apply because Dr. Schmitz told her that doing so would be an exercise in humiliation because Allina’s management did not like her or trust her.

Dr. Finch also claimed that, during her time at Abbott, Dr. Schmitz “used the salary guarantee as a point of leverage” and indicated that if she “played along,” he would eventually allow her to move to productivity-based compensation. Dr. Finch maintained that she had been “willing, even eager” to increase her productivity, but that she had seen no incentive to work harder while at Abbott because Dr. Schmitz “had made clear that he would not allow” Dr. Finch to transition to productivity-based compensation.

In the fall of 2016, CKRI’s lead clinical psychologist recruited Dr. Finch for a clinician role. In January 2017, CKRI extended a job offer to Dr. Finch, which she

accepted. As part of the transition, Dr. Finch continued on guaranteed compensation; she understood that “[w]henever you’re a new hire you’re on guarantee.”

Before Dr. Finch started her new position, Carruthers told CKRI’s management that she had a negative impression of Dr. Finch. Dr. Finch testified that during her time at CKRI, she received incorrect paychecks and erroneous or inconsistent information regarding her available leave and benefits, was given a raise that she was later required to pay back, and was incorrectly informed that her position might be eliminated. Dr. Finch also testified that an Allina employee had warned CKRI employees that Dr. Finch was a “bad person” and “bad news.” She also claimed that she endured “constant negative comments from staff.”

On July 14, 2017, Dr. Finch filed her discrimination charge with the MDHR. In February 2018, she filed her complaint in this action. On June 28, 2018, Allina extended Dr. Finch’s guaranteed compensation for another year, claiming it did so because Dr. Finch “had been on a leave of absence for her first two months at [CKRI]” and had “worked at three different work locations.”

In July 2019, Dr. Finch and her husband decided that he would accept a job in Portland, Oregon. They arrived in Portland on August 1, 2019, and the next day, Dr. Finch emailed a letter of resignation to Allina, effective August 5, 2019. Dr. Finch claimed that, had she been “happy or treated well at Allina,” she and her husband would not have moved.

Dr. Finch received approximately \$120,000 more in guaranteed compensation during the course of her Allina employment than she would have been paid based on her actual productivity. But Dr. Finch claimed that she and her husband performed calculations

based on the number of hours she had previously worked in private practice and concluded that she would have made “over \$200,000 per year.”

At summary judgment, Allina admitted that Dr. Finch engaged in four acts of protected conduct: (1) the December 2015 report about Dr. Gottlieb’s misconduct; (2) the filing of the January 2016 complaint with the Minnesota Board of Psychology; (3) the filing of the July 2017 MHRA charge; and (4) the initiation of the lawsuit in March 2018. The parties disputed (1) whether Dr. Finch engaged in additional instances of protected conduct; (2) whether Dr. Finch experienced adverse employment actions based on Dr. Schmitz’s and other colleagues’ conduct, Allina’s decision to keep Dr. Finch on guaranteed compensation, and Allina’s alleged constructive discharge of Dr. Finch; and (3) the existence of any causal connection between protected conduct and adverse employment actions. The district court granted Allina’s motion for summary judgment, concluding that Dr. Finch only engaged in the agreed-upon four acts of protected conduct, that she either failed to provide substantial evidence supporting her claims of adverse employment action or that Allina’s actions were not adverse as a matter of law, and that the record did not contain substantial evidence of a causal connection between Finch’s protected conduct and some of Allina’s actions.

This appeal follows.

DECISION

I. The district court properly dismissed the sex-discrimination claim as barred by the applicable statute of limitations.

The district court dismissed Dr. Finch’s sex-discrimination claim as time-barred because she failed to allege any sex discrimination within the statutory limitations period.³ We agree that dismissal was appropriate because the claim is time-barred.

A party may move to dismiss based upon a claimant’s “failure to state a claim upon which relief can be granted.” Minn. R. Civ. P. 12.02(e). A claim is legally sufficient “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). “We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party.” *DeRosa v. McKenzie*, 936 N.W.2d 342, 346 (Minn. 2019). We review a district court’s grant of a motion to dismiss for failure to state a claim de novo. *Abel*, 947 N.W.2d at 68.

The MHRA prohibits an employer from discriminating against an employee on the basis of sex “[e]xcept when based on a bona fide occupational qualification.” Minn. Stat. § 363A.08, subd. 2(3). Discrimination includes sexual harassment, Minn. Stat. § 363A.03, subd. 13 (2018), which means “unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication

³ The district court also reasoned that the complaint failed to state a claim for sex discrimination because the complaint contains no allegation that the “acts of alleged discrimination were based on her sex” or were “the result of her gender.” Because we find that the sex-discrimination claim is time-barred, we need not address the alternative basis for dismissal.

of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.” Minn. Stat. § 363A.03, subd. 43(3) (2018).

“A claim of an unfair discriminatory practice must be brought as a civil action . . . or filed in a charge with the commissioner within one year after the occurrence of the practice.” Minn. Stat. § 363A.28, subd. 3(a) (2018). But the statute of limitations may be tolled for continuing violations “where a pattern of discriminatory conduct constitute[s] a sufficiently integrated pattern to form, in effect, a single discriminatory act.” *Abel*, 947 N.W.2d at 70 (quotation omitted). “A plaintiff can prove a continuing violation of the Human Rights Act by demonstrating (1) a series of related acts, one or more of which fell within the limitations period, or (2) the maintenance of a discriminatory system both before and during the limitations period.” *Id.* at 71 (quotation omitted).

On July 14, 2017, Dr. Finch filed a charge with the MDHR. The parties agree that the one-year limitations period therefore began on July 14, 2016. *See* Minn. Stat. § 363A.28, subd. 3(a). In her complaint, Dr. Finch alleged instances of sexually charged and inappropriate remarks sufficient to constitute discriminatory sexual harassment. But that alleged conduct occurred before June 14, 2016. The complaint contains no allegations of other plausible instances of sexual harassment occurring within the limitations period. Instead, the allegations set forth in the complaint focus on alleged reprisal and describe instances of general harassment, intimidation, and hostility. Dr. Finch maintains that dismissal was improper because it was possible that she might produce evidence of further

sex discrimination consistent with her pleadings. But because she failed to allege in her complaint any other instance of sexual harassment occurring within the limitations period, dismissal was proper.

II. The district court properly dismissed the negligence claim as preempted by the exclusivity provision set forth in the MHRA.

The district court dismissed Dr. Finch’s negligence claim, reasoning that Allina owed no common-law duty to Dr. Finch separate and distinct from statutory duties covered by the MHRA. Dr. Finch argues that the district court’s decision was a premature and improper limitation on alternative remedies and that the supreme court’s decision in *Abel*, 947 N.W.2d at 77-80, controls. Allina urges us to affirm, arguing that (1) there is no independent common-law duty for an employer to protect against sexual harassment or reprisal, (2) Dr. Finch’s allegations are insufficient to establish a duty, and (3) the MHRA preempts the negligence action because the negligence and MHRA claims are premised on the same allegations. We agree that the MHRA preempts the common-law negligence claim.

The MHRA provides that “as to acts declared unfair by sections 363A.08 to 363A.19, and 363A.28, subdivision 10, the procedure herein provided [by the MHRA] shall, while pending, be exclusive.” Minn. Stat. § 363A.04. “Preemption is primarily an issue of statutory interpretation, which is subject to de novo review.” *DSCC v. Simon*, 950 N.W.2d 280, 287 (Minn. 2020) (quotation omitted).

Minnesota courts have previously addressed the scope of the MHRA’s preemption provision. In *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, the supreme court concluded

that the MHRA preempted a whistleblower claim when the reprisal and whistleblower claims rested on the same facts. 551 N.W.2d 483, 485-86 (Minn. 1996). In *Vaughn v. Nw. Airlines, Inc.*, the supreme court concluded that the MHRA did not preempt a common-law negligence claim despite a common factual basis because the MHRA served a legislative purpose distinct from that of a common-law claim. 558 N.W.2d 736, 744-45 (Minn. 1997). In *Pierce v. Rainbow Foods Grp., Inc.*, Minnesota’s federal district court stated:

[T]he MHRA preempts a common law cause of action if:
(1) the factual basis and injuries supporting the common law claim also would establish a violation of the MHRA, and
(2) the obligations the defendant owes to the plaintiff, as a practical matter, are the same under both the common law and the MHRA.

158 F. Supp. 2d 969, 975-76 (D. Minn. 2001); *see also Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999) (explaining that we give “strong weight” to federal courts’ interpretations of Title VII claims when considering MHRA claims), *review denied* (Minn. Oct. 21, 1999).

The supreme court recently reversed the district court’s dismissal of Abel’s negligence claim, in part because a determination of preemption under the MHRA was premature. *Abel*, 947 N.W.2d at 80. The supreme court recognized that Abel’s status as an unpaid practicum student gave rise to a dispute about the applicability of the MHRA to Abel’s claims, and, at the early stage of the litigation, no court had definitively determined what obligations, if any, were owed to Abel under the MHRA. *Id.* at 73-76, 80. In that context, the court concluded that “[u]ntil a determination is made that the Human Rights

Act covers the claims of an unpaid practicum student, the Human Rights Act's exclusivity provision has no application. A decision preempting the negligence claims at this point is therefore premature.” *Id.* at 80 (emphasis added).

The parties agree that, unlike Abel, Dr. Finch was formally employed by Allina. In recognition of her undisputed status, Dr. Finch framed her negligence claim in the complaint as arising within the confines of that employment relationship and specifically alleged that Allina owed her a duty of care “as [an] employee.” Dr. Finch then alleged that the breach of that duty of care arose in the employment context, namely, “by exposing [her] to sustained sexual harassment, hostile environments, and discrimination on the basis of the sex of [Dr. Finch].”

The complaint makes clear that any duty owed to Dr. Finch arose out of her employment relationship with Allina and that the alleged breach of that duty occurred during the course of employment and involved sex discrimination, the very acts covered by the MHRA.⁴ Dr. Finch’s negligence theory is expressly premised on (1) a duty of care that required Allina to protect her against sex discrimination and (2) a breach of that duty premised on Allina’s failure to protect against sex discrimination.⁵ The MHRA specifically

⁴ Dr. Finch claims another theory based on actual or threatened physical injury, emphasizing that evidence produced at summary judgment demonstrated she was “assaulted” by Dr. Gottlieb when he “grabbed [her] arm and tried to pull [her] . . . into the hallway.” But this theory bears no relationship to the complaint’s allegation that Allina breached its duty of care by exposing Dr. Finch to “sexual harassment, hostile environments, and discrimination on the basis of . . . sex.”

⁵ When asked at oral argument whether Allina owed Dr. Finch any duty separate and apart from that arising from the employment relationship, Dr. Finch could identify none. She

prohibits an employer from engaging in sex discrimination. Minn. Stat. § 363A.08, subd. 2(3). So “as a practical matter,” the obligations Allina owed to Dr. Finch “are the same under both the common law and the MHRA.” *Pierce*, 185 F. Supp. 2d at 976. The factual bases supporting the MHRA claim and the negligence claim are identical. *See id.* at 975-76. Because Dr. Finch’s negligence claim rests on allegations that would establish a violation of the MHRA, and because the duty of care under a common-law negligence theory is the functional equivalent of duties imposed under the MHRA, the district court properly concluded that the MHRA preempted Dr. Finch’s negligence claim.⁶

III. The district court erred by dismissing the reprisal claim at summary judgment because the record establishes the existence of genuine disputes of material fact.

The district court dismissed Dr. Finch’s reprisal claim, concluding that she either failed to produce substantial evidence supporting a prima facie reprisal claim or failed to demonstrate that Allina’s proffered nondiscriminatory reasons for its conduct were a pretext for discrimination. Dr. Finch argues that the district court erred by improperly weighing evidence, resolving genuine disputes of material fact, and misapplying the law.

contended that Allina owed her duties by virtue of a special relationship but conceded that the relationship was “special” simply because she was an employee.

⁶ We reject Dr. Finch’s arguments that dismissal is a premature limitation on remedies and that Allina cannot claim both that the MHRA preempts the negligence claim and that Dr. Finch cannot recover under the MHRA. The dismissal of the MHRA claim as time-barred *assumed* that the MHRA applied to Dr. Finch’s allegations. The district court did not decide that the MHRA did not apply to Dr. Finch. Likewise, we discern no improper limitation on alternative theories. The legislature rendered the MHRA exclusive as to the acts it declared unfair. Minn. Stat. § 363A.04. The proper function of the exclusivity provision necessarily precludes alternative negligence claims functionally identical to pending MHRA claims.

“The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. “When a motion for summary judgment is made and supported, the nonmoving party must present facts showing that there is a genuine issue as to a material fact.” *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 230 (Minn. 2019) (citing *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997)). A genuine issue of material fact does not arise from “unverified and conclusory allegations” or “metaphysical doubt about the facts.” *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). “On appeal from summary judgment, we examine whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020). “We view the evidence in the light most favorable to the nonmoving party.” *Id.* Summary judgment is not proper if reasonable persons could draw different conclusions from the evidence. *Id.*

The MHRA prohibits reprisal as follows:

It is an unfair discriminatory practice for any individual who participated in the alleged discrimination . . . to intentionally engage in any reprisal against any person because that person . . . opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job

classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

Minn. Stat. § 363A.15.

A plaintiff may prove a reprisal claim by direct evidence or by “using circumstantial evidence in accordance with the three-part burden-shifting test set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, . . . (1973).”⁷ *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). A plaintiff proceeding under the *McDonnell Douglas* framework bears the initial burden of establishing a prima facie case of reprisal. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). In order to prove a prima facie case, “an employee must establish: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). “Once the employee has established a prima facie case, the burden shifts to the employer to articulate a legitimate and non-discriminatory reason for the adverse employment action.” *Fletcher*, 589 N.W.2d at 102. If the employer sets forth a legitimate, nondiscriminatory reason for its actions, then the burden shifts back to the plaintiff “to show that the proffered reasons were not the true reason for the action, but were instead a pretext for discrimination.” *Id.*

⁷ “A plaintiff proceeding under a direct-evidence framework need not establish a *McDonnell Douglas* prima facie case.” *Friend v. Gopher Co.*, 771 N.W.2d 33, 38 (Minn. App. 2009). “[D]irect-evidence cases are adjudicated based on the strength of affirmative evidence of discriminatory motive.” *Id.* Here, the parties and the district court considered Dr. Finch’s claims under the *McDonnell Douglas* framework.

A. The district court improperly weighed evidence when it rejected Dr. Finch's claims of additional protected conduct.

The district court concluded that Dr. Finch failed to produce substantial evidence supporting her claims that she engaged in protected conduct by: (1) meeting with Dr. Goering and Carruthers regarding ongoing retaliation; or (2) repeatedly raising concerns about harassment and retaliation. Dr. Finch argues that she produced evidence of protected conduct and that the district court improperly weighed the evidence and resolved factual disputes.

Under the MHRA, statutorily protected conduct includes opposing a practice forbidden under the MHRA. Minn. Stat. § 363A.15. The supreme court has not yet decided whether a complainant must establish that she opposed conduct that *actually* violated the MHRA or whether she must establish that she opposed conduct which she *in good faith believed* violated the MHRA. See *Bahr v. Capella Univ.*, 788 N.W.2d 76, 82 (Minn. 2010). We need not decide this question because under either standard, summary judgment was improper.

The record contains conflicting evidence regarding the substance of the discussions that occurred in the meeting involving Dr. Finch, Dr. Goering, and Carruthers. On the one hand, Carruthers testified that the topics of retaliation or other discrimination were not raised during the meeting. On the other hand, Dr. Finch testified that she told Dr. Goering and Carruthers that she was “afraid” of Dr. Schmitz and that she specifically sought the meeting to “express concerns” about retaliation and ongoing discrimination. The record also contains handwritten notes taken by Carruthers during the meeting, including “quid

pro quo,” “feel cornered,” “[f]eel like can’t talk about problems - keep quiet,” and “Becky comments - ‘make it hard for you to work here.’” This evidence is sufficient to establish a factual dispute as to whether Dr. Finch actually reported conduct prohibited by the MHRA. But rather than acknowledge the existence of the factual dispute, the district court erroneously and improperly weighed and credited Allina’s evidence that Dr. Finch never reported misconduct during the meeting.

We reject Dr. Finch’s arguments regarding the other disputed instances of protected conduct. She claims that she engaged in additional protected conduct by telling other employees she was “afraid of [her] supervisor,” but we cannot discern from the record the nature of the conduct Dr. Finch allegedly reported and therefore cannot conclude that she reported conduct prohibited, or in good faith believed to be prohibited, by the MHRA. Dr. Finch also contends that she engaged in protected conduct by reporting Dr. Gottlieb’s prohibited contact with students, but such a report involved a violation of Allina’s policy—not the MHRA. Last, Dr. Finch cites testimony in which she described her reports to a human-resources employee regarding Dr. Schmitz’s alleged intimidation. But Dr. Finch did not present this theory to the district court, so we deem it forfeited on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

B. The district court erred by rejecting two claims of adverse action based on intimidation despite the existence of genuine disputes of material fact.

The district court concluded that Dr. Finch either failed to substantially support her claims of adverse employment actions or that Allina’s actions were simply not “adverse”

as a matter of law. Again, Dr. Finch argues that the district court improperly weighed evidence and that the record demonstrates genuine disputes of material fact.

“[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Moore v. City of New Brighton*, 932 N.W.2d 317, 326 (Minn. App. 2019) (quotation omitted) (addressing the Minnesota Whistleblower Act), *review denied* (Minn. Oct. 15, 2019). “[T]he ‘materially adverse employment action element may be met’ based on the cumulative effect on the employee ‘if the [alleged retaliatory] acts, considered in the aggregate, would dissuade a reasonable employee’ from making the protected report.” *Id.* at 328 (quoting *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011)).

Here, Dr. Finch argued that she faced adverse employment actions based on Dr. Schmitz’s alleged intimidation of Dr. Finch, Allina’s decision to continue Dr. Finch on guaranteed compensation, alleged attacks and ostracism by colleagues, and Allina’s alleged constructive discharge of Dr. Finch. We address each claim in turn.

1. *Genuine disputes of material fact exist regarding Dr. Schmitz’s alleged intimidation of Dr. Finch.*

The district court concluded that Dr. Finch failed to produce substantial evidence demonstrating that Dr. Schmitz intimidated her in an effort to prevent her application for the training-director role. In so doing, the district court discredited the following direct testimony from Dr. Finch:

Dr. Schmitz also told me that I should not bother applying for the training director position because my reports of

discrimination, harassment, and retaliation meant that upper management did not ‘like me’ or ‘trust me.’ It was in this context that Dr. Schmitz told me that pursuing the training director position would be an ‘exercise in humiliation’ and there was ‘no chance’ I would get the position.⁸

Instead of construing this evidence in the light most favorable to Dr. Finch, the district court improperly weighed and discredited Dr. Finch’s testimony, finding, “The evidence demonstrates that Dr. Schmitz did have some conversation with Dr. Finch regarding the position, but that they discussed the pros and cons of it.”

Allina suggests that Dr. Finch’s claim fails because she did not prove that she would have actually applied for the job but for Dr. Schmitz’s statements and that she would have been discriminatorily rejected. Allina relies on *Int’l Bhd. of Teamsters v. United States*, in which the Supreme Court said, “Resolution of the non-applicant’s claim . . . requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied.” 431 U.S. 324, 368 n.52, 97 S. Ct. 1843, 1871 n.52 (1977). *Teamsters* concerned a charge of race-based discrimination in hiring, assignment, and promotion policies. *Id.* at 328-29, 97 S. Ct. at 1851. Although a refusal to hire is *one* type of reprisal under Minn. Stat. § 363A.15 (“It is a reprisal for an

⁸ Allina argues that the alleged statements fall far short of conduct causing material disadvantage, likening this case to *McClure v. Career Sys. Dev. Corp.*, 447 F.3d 1133, 1136 (8th Cir. 2006). But *McClure* involved a failure-to-promote claim (not a reprisal claim) and concluded “no reasonable fact finder” could conclude that a potential misrepresentation regarding a master’s-degree requirement caused McClure to not apply when the evidence demonstrated that the job posting “conspicuous[ly]” required only an associate’s degree, when others told McClure about the position, and when he decided not to apply. *Id.* The question here is whether Dr. Schmitz engaged in intimidation that dissuaded Dr. Finch from engaging in protected conduct, not whether the alleged intimidation stopped Dr. Finch from applying for the position.

employer to . . . refuse to hire the individual . . .”), that is not the *only* form of reprisal contemplated by the MHRA. Reprisal also includes “*any* form of intimidation, retaliation, or harassment.” Minn. Stat. § 363A.15 (emphasis added). And under the statute, the general inquiry is whether an individual “engage[d] in *any* reprisal against any person because that person . . . opposed a practice forbidden” under the MHRA. *Id.* (emphasis added). The answer to that question entails consideration of whether Dr. Schmitz’s conduct “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Moore*, 932 N.W.2d at 326. Here, the record contains evidence that Dr. Schmitz’s statements might have dissuaded a reasonable employee from engaging in protected conduct, *even assuming* that Dr. Finch might not have applied for the job and that the job would have gone to a more qualified candidate.

Relatedly, Allina contends that Dr. Finch’s “after-the-fact, self-serving testimony” is insufficient to support a genuine dispute of material fact. It is true that a self-serving affidavit contradicting prior sworn testimony does not create a genuine issue of material fact sufficient to defeat a motion for summary judgment. *See Banbury v. Omnitrition Int’l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). And as the district court noted, Dr. Finch did testify that “at the time,” she was not interested in the training-director role and that she “didn’t go to Abbott to be in the training program or be a training director.” But the cited testimony relates to points in time far removed from Dr. Schmitz’s alleged intimidation and instead relates to (1) the time at which Dr. Finch joined Abbott, and (2) December 2015, when she informed Dr. Schmitz in an email that she was not pursuing Dr. Gottlieb’s role. Notably, Dr. Finch *also* testified that she *later* became interested in the

role when the position opened in 2016. The record evidence that Dr. Finch became interested in the role by June 2016 is not necessarily inconsistent with her testimony that she may not have initially been interested in the position when she was first employed or even immediately after Dr. Gottlieb's departure.

Accordingly, the record contains evidence sufficient to demonstrate a genuine dispute of material fact as to whether Dr. Schmitz engaged in intimidation.

2. *Genuine disputes of material fact exist regarding Dr. Cook's alleged intimidation of Dr. Finch.*

The district court rejected Dr. Finch's claim of adverse action based on "attacks and ostracism by coworkers" because Dr. Finch "merely . . . labeled her coworkers' treatment as harassment and ostracism without providing substantial evidence to support her claim" and therefore "failed to create a material fact dispute." Dr. Finch again contends that the district court improperly weighed and discredited evidence favorable to her while Allina contends that Dr. Finch's allegations fail as a matter of law.⁹

"[O]stracism and rudeness by supervisors and co-workers do not rise to the level of an adverse employment action." *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 831 (8th Cir. 2002) (quotation omitted). "[W]ithout evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage, general allegations of co-worker ostracism are not sufficient to rise to the level of an adverse employment action" *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969-70 (8th Cir. 1999).

⁹ Dr. Finch also contends that a patient scheduler engaged in reprisal by diverting new patients away from her, but she failed to present the argument to the district court, and so we do not address the theory on appeal. *See Thiele*, 425 N.W.2d at 582.

We therefore conclude that the majority of the record evidence of workplace rudeness and ostracism is insufficient as a matter of law to constitute reprisal.

But the record contains evidence of some potentially actionable conduct. The record contains extensive evidence of alleged conduct by Dr. Cook rising far beyond the level of mere rudeness. Dr. Finch testified that Dr. Cook responded to Dr. Finch's reports by telling Dr. Finch that she "needed to shut the f-ck up and leave it alone," that she "needed to not complain about anything," that she would "regret that [she] had ever come to work [at Abbott]," that Dr. Cook would "make sure that [Dr. Finch] was suffering," and that Dr. Cook would ensure Dr. Finch would "not get referrals." These statements, if true, are sufficient to constitute intimidation such that a reasonable person might be dissuaded from reporting discrimination. See Minn. Stat. § 363A.15; *Moore*, 932 N.W.2d at 326. Accordingly, the record contains evidence sufficient to demonstrate a genuine dispute of material fact as to whether Dr. Cook engaged in reprisal through intimidation.¹⁰

3. *There is no genuine dispute of fact that ongoing guaranteed compensation was not an adverse employment action.*

The district court concluded that the decision to continue Dr. Finch in the guaranteed-compensation structure was not a materially adverse employment action. In so doing, the district court cited undisputed evidence that, based on Dr. Finch's *actual* work performed, she received approximately \$120,000 more in guaranteed compensation than

¹⁰ The parties do not address whether Dr. Cook's conduct as a non-supervisory colleague of Dr. Finch is attributable to Allina. We therefore do not decide the issue, but we note the presence of evidence in the record that Dr. Finch reported Dr. Cook's conduct to Dr. Schmitz and human resources.

she would have received on productivity-based compensation during her employment at Allina. Although Dr. Finch claimed that she (1) requested to be transitioned to productivity-based compensation, (2) was willing to work more hours, and (3) would have been able to generate 120 work-relative productivity units based on her private-practice history, the district court rejected those allegations as conjecture not based on evidence.

We agree. Mere speculation is not enough to avoid summary judgment, and evidence cannot rest upon mere conjecture. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Dr. Finch’s assertion that she would have worked harder on productivity-based compensation is speculative by nature. Her claim that she could have generated 120 work-relative productivity units per week and her suggestion that she “would make over \$200,000” if she “worked as many hours as [she] had in private practice” are equally speculative. We discern no error in the district court’s conclusion that these assertions bear no probative value and are insufficient to establish a genuine issue of material fact. *See DLH*, 566 N.W.2d at 70 (“[W]hen determining whether a genuine issue of material fact for trial exists, 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.”).

4. *There is no genuine dispute of fact that Allina did not constructively discharge Dr. Finch.*

The district court concluded that the record does not contain substantial evidence demonstrating that Dr. Finch was constructively discharged. Dr. Finch contends that the record contains disputed evidence that Allina created working conditions a reasonable

person would have found intolerable and that the district court erred by weighing conflicting evidence.

“A constructive discharge is a resignation which is caused by illegal discrimination” and which “occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination.” *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 660 (Minn. App. 2011) (quotations omitted), *review denied* (Minn. Apr. 19, 2011). “To establish a constructive discharge, a plaintiff must prove that the employer’s illegal discrimination created intolerable working conditions and that the employer either intended to force the employee to quit or could have reasonably foreseen that its conduct would force the employee to quit.” *Id.* In the context of the MHRA, “a plaintiff may invoke the constructive discharge doctrine to establish an adverse employment action despite his or her resignation.” *Id.* at 660-61. Whether an employee’s working conditions are intolerable is typically a question of fact. *See Navarre v. S. Wash. Cty. Sch.*, 633 N.W.2d 40, 57 (Minn. App. 2001) (“Whether employment conditions are in fact intolerable is a question of fact judged by a reasonable-person standard.”), *rev’d on other grounds*, 652 N.W.2d 9 (Minn. 2002). But summary judgment may be appropriate when “[r]easonable persons could not draw different conclusions from the evidence presented.” *DLH*, 566 N.W.2d at 73; *see also Kenneh*, 944 N.W.2d at 232 (“[W]hether the alleged harassment was sufficiently severe or pervasive as to create a hostile work environment is generally a question of fact for the jury. . . . In order to remove such a question of fact from the jury on summary judgment, the court would have to determine that no reasonable jury could find the conduct at issue severe or pervasive.” (quotations omitted)).

Here, Dr. Finch presented evidence that she faced “constant negative comments from staff,” received erroneous paychecks and inconsistent information regarding benefits, was required to pay back a pay raise, received erroneous communications that her position might be eliminated, and was ostracized.¹¹ We conclude that these circumstances are insufficient as a matter of law to constitute intolerable working conditions under a reasonable-person standard.¹²

Dr. Finch contends that the circumstances of her alleged constructive discharge from CKRI in August 2019 must include the circumstances of her employment at Abbott, which ended more than two years prior in April 2017. We see no principled reason why a reasonable person would consider conditions two years removed in assessing whether present working conditions are intolerable. And although Dr. Finch produced evidence of a potentially intolerable environment at Abbott, the record does not contain evidence of sufficiently intolerable conditions at CKRI. She instead produced evidence of human-resources errors that were corrected.

¹¹ Dr. Finch also cites conduct occurring during the litigation as intolerable working conditions giving rise to her constructive discharge, including that she was “accused of lying” during her deposition and that she observed Allina’s counsel rolling her eyes and laughing while Dr. Finch cried during a deposition. While this conduct, if true, is unprofessional and inappropriate, it bears no relation to a condition of employment.

¹² Regarding Allina’s rescission of Dr. Finch’s pay raise, Allina presented evidence that Dr. Finch received an *erroneous* pay raise based on a misclassification of her employment status. Dr. Finch did not produce evidence that Allina’s explanation for its action was a pretext for discrimination.

Because no reasonable person could conclude that Dr. Finch faced intolerable working conditions, the district court properly rejected Dr. Finch’s claim of adverse action based on constructive discharge.

C. Genuine disputes of material fact exist regarding causal connections between protected conduct and adverse employment actions.

Because the district court concluded that Dr. Finch failed to support her claims of intimidation, attacks/ostracism, and constructive discharge, it concluded that Dr. Finch could not establish a causal connection with protected conduct.¹³ On appeal, Allina argues that, even if the record contains genuine issues of material fact with respect to any of the above-described adverse employment actions, summary judgment was still proper because the record lacks evidence connecting such adverse employment action to Dr. Finch’s protected conduct. We disagree.¹⁴

A prima facie case of reprisal requires a complainant to establish a causal connection between protected conduct and the adverse employment action. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995). “The causal connection requirement may be satisfied by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time.” *Id.* (quotation omitted).

¹³ The district court briefly addressed a connection to rude comments and Dr. Cook’s “decision to no longer be friends with Dr. Finch,” but that circumstance is separate from Dr. Cook’s alleged intimidation of Dr. Finch.

¹⁴ We limit our consideration of causation evidence to the two adverse employment actions we conclude are actionable.

The record contains ample evidence connecting the December 2015 and January 2016 complaints by Dr. Finch and her June 2016 meeting with Dr. Goering and Carruthers to the actionable intimidation by Dr. Schmitz. Dr. Finch specifically testified that “Dr. Schmitz also told me that I should not bother applying for the training director position *because my reports of discrimination, harassment, and retaliation* meant that upper management did not ‘like me’ or ‘trust me.’” (Emphasis added.) By linking management’s purported negative views of Dr. Finch to her complaints, the alleged statements made clear that Dr. Schmitz had “actual . . . knowledge of the protected activity” sufficient to “justify an inference of retaliatory motive.” *Id.*

Allina contends that Dr. Schmitz’s alleged statements in summer 2016 are too far attenuated from the December 2015 and January 2016 protected conduct to support a causal connection. But we also conclude that a genuine dispute exists as to whether Dr. Finch’s June 2016 meeting with Dr. Goering and Carruthers, which is more proximate to Dr. Schmitz’s alleged statements, comprised protected conduct. In any event, temporal proximity is merely one circumstance supporting a causal connection. *See id.* Dr. Schmitz’s alleged statements directly referencing Dr. Finch’s complaints support an inference that he intimidated Dr. Finch because of her protected conduct.

The record also contains sufficient evidence connecting protected conduct by Dr. Finch to intimidation by Dr. Cook. Dr. Finch specifically testified that Dr. Cook told Dr. Finch that she should not have reported Dr. Gottlieb, that Dr. Finch would pay for it, and that Dr. Cook would make sure Dr. Finch suffered as a result of her protected conduct. The evidence is sufficient to establish a genuine factual dispute as to a causal connection.

D. Allina failed to demonstrate any legitimate, nondiscriminatory reason for the alleged adverse employment actions.

Although the district court did not reach the issue of whether Allina had legitimate, nondiscriminatory reasons for its adverse employment actions or whether those reasons were a pretext for discrimination,¹⁵ Allina contends that it had legitimate, nondiscriminatory reasons for ultimately hiring a different doctor for the training-director role and that Dr. Finch failed to present any evidence of pretext. But the adverse employment action was not the hiring decision itself but instead the statements of intimidation by Dr. Schmitz and Dr. Cook that reasonably may have dissuaded Dr. Finch from engaging in protected activity. Allina offers no legitimate, nondiscriminatory justification for such statements and we discern none from the record.

Conclusion

We affirm the district court's decision dismissing Dr. Finch's sex-discrimination and negligence claims because the complaint does not contain allegations of any instance of sex discrimination occurring within the statutory limitations period and the MHRA's exclusivity provision preempts the negligence claim. We reverse in part the district court's summary-judgment decision on the reprisal claim and remand for further proceedings

¹⁵ The district court *did* conclude that Allina offered legitimate, nondiscriminatory reasons why Dr. Finch remained in the guaranteed-compensation structure and that Dr. Finch failed to produce substantial evidence that those reasons were a pretext for discrimination. We do not address this finding because we determine that the guaranteed-compensation structure was not an adverse employment action.

because genuine issues of disputed material fact exist regarding alleged instances of protected conduct and adverse employment actions as set forth herein.¹⁶

Affirmed in part, reversed in part, and remanded.

¹⁶ The parties also dispute whether Abbott should be dismissed as a party to the action because it is merely an assumed name of Allina and not an independent legal entity against which an action may proceed. The district court concluded that Abbott was an assumed name of Allina and cited caselaw standing for the proposition that assumed-name defendants are not subject to suit, *see D.W. v. Radisson Plaza Hotel Rochester*, 958 F. Supp. 1368, 1382 (D. Minn. 1997), implying that summary-judgment dismissal of Abbott was appropriate regardless of the parties' substantive reprisal arguments. Dr. Finch contends that summary judgment was improper on this basis because (1) Allina waived any argument as to insufficiency of service; and (2) a genuine issue of material fact exists as to whether Abbott is a separate legal entity subject to suit. We deem the issue moot because Dr. Finch named only Allina, not Abbott, as a defendant in Count IV for reprisal in her complaint, and because the district court had already dismissed Dr. Finch's sex-discrimination and negligence counts, which named *both* Allina and Abbott. *See Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App. 2004) (indicating that issues are moot if decision on merit becomes unnecessary or if effectual relief cannot be granted).