

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0821**

Scot A. Lacek,
Appellant,

vs.

Evolutionary Systems Corp,
Respondent.

**Filed April 26, 2021
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Carver County District Court
File No. 10-CV-19-280

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Considered and decided by Cochran, Presiding Judge; Larkin, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the summary-judgment dismissal of his claim for untimely payment of earned wages and commissions and his separate claims for unpaid

commissions. He also challenges the district court's denial of his motion to amend his complaint to add a claim of age discrimination. We affirm in part, reverse in part, and remand.

FACTS

In March 2016, respondent Evolutionary Systems Corp (Evosys) hired appellant Scot A. Lacek to sell software implementation services, pursuant to an employment contract that provided Lacek an annual salary, which was payable in monthly installments subject to approval of Lacek's time-sheets. Under the contract, Lacek could earn commissions in addition to his salary. The contract could be terminated by either party with two weeks' notice, without notice on certain grounds, or with a payment of "two weeks of basic salary in lieu of notice."

On August 7, 2018, Evosys terminated Lacek's employment. Over the next two days, the parties communicated regarding the termination. Evosys provided Lacek with a termination letter stating that Lacek's last paycheck would be deposited on August 21, 2018, that he would be paid his salary through August 7 plus two weeks of severance pay in lieu of notice, and that he would be paid for earned but unused vacation days and certain expense reimbursements. The letter also stated that Evosys would continue to pay "commissions earned on any accounts registered to" Lacek in the Customer Relationship Management (CRM) system "for payments collected" through July 31, 2018.

Lacek initially emailed Evosys and inquired about his commissions and expenses. He then emailed Evosys demanding "immediate payment of all earned wages and commissions (as defined in [his] previous email) from Evosys." The record suggests that

Lacek sent the second email on both August 8 and 9. On August 10, Evosys sent Lacek an email stating that he would “be paid salary and commissions collected as indicated in the termination letter along with pending approved expenses.” Evosys subsequently issued a number of payments to Lacek.

Lacek sued Evosys in conciliation court, seeking commissions and other relief. The conciliation court granted some of Lacek’s requested relief. In doing so, the court noted the complexity of the case and said it was “not well-suited for accurate determination in the context of a conciliation court case.” Lacek removed the matter to district court for a de novo trial.

In April 2019, Lacek filed an amended complaint seeking \$25,129.45 in damages, fees, and costs. He asserted that Evosys illegally withheld “wages, travel expense reimbursement, vacation payout, severance, interest, and commissions for his term of employment.” He further alleged that he was entitled to a financial penalty from Evosys under Minn. Stat. § 181.13 (2020). Evosys filed an answer and counterclaims, but it later dismissed the counterclaims.

In July 2019, Lacek moved to amend his complaint. Among his requested amendments, he sought to add an age-discrimination claim. The district court denied Lacek’s motion, concluding that the claim was untimely, speculative, and factually unsupported.

In November 2019, Evosys moved for summary judgment, arguing that it had paid Lacek in accordance with Minnesota law and the terms of the employment contract. Lacek opposed summary judgment, and in January 2020, he once again moved to amend his

complaint. In April 2020, the district court denied Lacek’s motion to amend and granted summary judgment for Evosys. This appeal followed.

DECISION

“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). There is no genuine issue of material fact if “the nonmoving party presents evidence . . . 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). Conversely, summary judgment is inappropriate if reasonable people can draw different conclusions from the evidence presented. *Id.* at 69.

We review a district court’s grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). In doing so, 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.* We need not adopt the district court’s reasoning and “may affirm a grant of summary judgment if it can be sustained on any grounds.” *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I.

Lacek contends that the district court erred by granting summary judgment for Evosys on his claim under Minn. Stat. § 181.13 because the record shows that Evosys

failed to pay him within 24 hours of his demand. As a threshold matter, Evosys argues that Lacek failed to raise that issue in district court and that the issue is therefore not properly before this court on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.” (quotation omitted)). But in district court, Lacek argued that he was not timely paid his wages, including salary, in accordance with section 181.13. That issue is therefore properly before this court.

Section 181.13(a) provides, in relevant part:

When any employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee. Wages are actually earned and unpaid if the employee was not paid for all time worked at the employee’s regular rate of pay or at the rate required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater. If the employee’s earned wages and commissions are not paid within *24 hours after demand*, whether the employment was by the day, hour, week, month, or piece or by commissions, the employer is in default. In addition to recovering the wages and commissions actually earned and unpaid, the discharged employee may charge and collect a *penalty* equal to the amount of the employee’s average daily earnings at the employee’s regular rate of pay or the rate required by law, whichever rate is greater, for each day up to 15 days, that the employer is in default, until full payment or other settlement, satisfactory to the discharged employee, is made.

(Emphasis added.)

Section 181.13 “is a timing statute that requires prompt payment of wages actually earned.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 829 (Minn. 2012). “To recover under the statute the employee must establish an independent, substantive legal right, separate and distinct from section 181.13 to the particular wage claimed.” *Id.* at 837. In 2013, the legislature amended section 181.13 to define when wages are actually earned but unpaid. *Hall v. City of Plainview*, 954 N.W.2d 254, 270 (Minn. 2021). Wages are actually earned and unpaid “if the employee was not paid for all time worked at the employee’s regular rate of pay or at the rate required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater.” Minn. Stat. § 181.13(a). “The definition clarifies the timing of when an employee can bring a claim under section 181.13(a) by specifying when wages are actually earned and unpaid.” *Hall*, 954 N.W.2d at 270.

Viewing the evidence in a light most favorable to Lacek, genuine issues of material fact exist regarding whether Lacek is entitled to receive a financial penalty from Evosys for untimely payment of wages and commissions. The record indicates that on August 8 or 9 Lacek made a written demand for all earned wages and commissions. The record evidence further indicates that Lacek’s first posttermination payment did not occur until August 15, well beyond the 24-hour deadline imposed by section 181.13.

Evosys argues that the timing provision in Lacek’s contract, which stated that salary would be paid monthly subject to time-sheet approval, trumps the timing provision in section 181.13. We disagree. Section 181.13 plainly states that “[i]f the employee’s earned wages and commissions are not paid within 24 hours after demand, whether the

employment was by the day, hour, week, month, or piece or by commissions, the employer is in default.” In *Kvidera v. Rotation Eng’g & Mfg. Co.*, this court interpreted that language and held, “The plain meaning of this language is that an employer is required to pay the earned wages within 24 hours regardless of the interval at which the employee’s pay was calculated.” 705 N.W.2d 416, 424 (Minn. App. 2005). Likewise, in *Hruska v. Chandler Assocs., Inc.*, the supreme court indicated that section 181.13 supersedes any payment date in an employment contract, as the relevant inquiry is not whether the wages were due and payable at the time of the employee’s demand, but whether the wages were earned and unpaid. 372 N.W.2d 709, 716 (Minn. 1985).

Because there is a genuine issue of material fact regarding Lacek’s claim for a penalty under Minn. Stat. § 181.13 based on Evosys’s untimely payment of wages and commissions actually earned, summary judgment was inappropriate on this claim.

II.

Lacek contends that the district court erred by granting summary judgment on his claims seeking additional commissions. He claims he is entitled to additional commissions stemming from his work on three accounts: Actuant Phase 2, Datavail, and BOE. Generally, an employee’s right to payment of commissions arises from the employment contract. See *Schramsky v. Hollmichel*, 47 N.W.2d 177, 179 (Minn. 1951) (“It is well settled that a broker is entitled to his commission when he has performed all that he undertook to perform, and this necessarily depends upon the agreement of the parties.”); *Raddatz v. Northland Dev. Co. of Minneapolis, Inc.*, 352 N.W.2d 474, 478 (Minn. App.

1984) (stating that the procuring-cause doctrine applies only when no contract addresses the right of the salesperson to commissions), *review denied* (Minn. Oct. 11, 1984).

As a threshold matter, Evosys argues that it was not obligated to pay Lacek for commissions after his termination because a clause in the employment contract stated, “On termination, the Company shall not have any further liability to you other than as specifically set out in this Clause.” However, the clause does not indicate that it deprived Lacek of commissions already earned, but rather removed “further liability.” At a minimum, the clause is ambiguous. Summary judgment is inappropriate if a contract is ambiguous or uncertain. *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). In such cases, the district court should give the parties a full opportunity to present evidence of the facts, circumstances, and conditions surrounding the contract’s execution and the parties’ conduct. *Id.*

Evosys also argues that Lacek cannot raise a breach-of-contract claim on appeal because the district court denied Lacek’s request to amend his complaint to add a claim for breach of contract. But the district court denied that amendment because Lacek’s proposed breach-of-contract claim “mirror[ed] his initial claims” and did not constitute a new claim.

Having rejected Evosys’s threshold arguments, we turn to Lacek’s commission claims.

Actuant Phase 2 Commissions

Lacek argues that he is entitled to additional commissions stemming from his work on the Actuant Phase 2 account. As support, he points to a document showing that he was listed in Evosys’s CRM system for fiscal year 2018-2019 as the “TSM” for Actuant

“Project 2.” He also points to deposition testimony that he worked to procure the Actuant Phase 2 deal. For example, he testified that he provided work “in terms of winning the business, statusing the account, corresponding, and other activities that were involved with the closing out of the Phase 2.”

The employment contract’s terms governing the payment of commissions are sparse. The contract does state that “all opportunities being worked on need to be registered under the respective Sales person’s name” in the CRM system “to ensure clarity of ownership.” The evidence showing Lacek’s connection to Actuant Phase 2 in the CRM system therefore suggests that Lacek is entitled to commissions stemming from his work on the account. Evosys argues that the district court “correctly disregarded [this] evidence” because the “evidence instead showed that Lacek manipulated the CRM after-the-fact, in August 2018, just prior to his termination.” As support for that assertion, Evosys points to a July 2018 email from Lacek in which he stated that he was “not aware” of the Actuant Phase 2 “win” and was “caught off guard” when congratulated on the win. Although that evidence indicates that Lacek was not aware that the Actuant Phase 2 deal had been closed, it does not foreclose the possibility that Lacek worked on the deal and was entitled to a commission.

Evosys also argues that Lacek is not entitled to a commission for Actuant Phase 2 because he “failed to obtain a signed contract” for Actuant Phase 2, which “was considered a modification of the existing Actuant Phase 1 account.” The employment contract states, “Commission will be calculated at the end of each month on the agreed percentage (2.5% up to target quota and 3.5% above that) upon receipt of a signed contract and purchase

order.” Both parties appear to acknowledge that the Actuant Phase 2 deal was closed and a signed contract was obtained, but Evosys argues that “Lacek was not responsible for [it].” The record indicates that Lacek worked on the account and was connected to the account in the CRM system. Given the ambiguities of the employment contract, the record is sufficient to create a genuine issue of material fact regarding Lacek’s entitlement to commissions for his work on the Actuant Phase 2 account.

Evosys further argues that Actuant Phase 2 constituted revenue obtained from an existing contract, and therefore any commissions would go to the “delivery” person, rather than the salesperson, that is, Lacek. The employment contract contained a clause covering “[o]ther terms and conditions of employment,” and it stated that Lacek would “also be governed by the rules, regulations and such other practices, systems, procedures and policies framed, amended, modified or omitted” by Evosys “from time to time.” There is evidence in the record indicating that Evosys denied Lacek commissions on the Actuant Phase 2 account in accordance with such a policy. However, if the record is viewed in the light most favorable to Lacek, reasonable persons could reach different conclusions regarding whether Lacek is entitled to commissions stemming from the Actuant Phase 2 account. For example, Evosys’s letter terminating Lacek’s employment stated that Evosys would continue to pay commissions earned on any accounts registered to Lacek in the CRM system, and Lacek was listed in Evosys’s CRM system for fiscal year 2018-2019 as the “TSM” for Actuant “Project 2.”

In sum, a genuine issue of material fact exists regarding Lacek's entitlement to commissions for his work on the Actuant Phase 2 account, and summary judgment was inappropriate on this claim.

Datavail Commissions

Lacek argues that he is entitled to additional commissions for his work on the Datavail account. As support, he points to deposition testimony that he worked on the account, entered it into the CRM system, and was listed on a pricing document. Evosys, in turn, argues that Mike King, Lacek's supervisor, took over the account and is therefore entitled to the commissions. Evosys points to the following deposition testimony from King:

Datavail was a company that's actually . . . considered a competitor of Evosys, which means that their contracting has to be handled differently, which means management took over the deal specifically because of that reason. [A] [t]eaming agreement had to be put in place. The client specifically stated that they needed to work with executive management to do that, so that is why that deal was not a deal that was [Lacek's] deal.

And that was stated in an email specifically that I was going to take the lead on it. So that's my summary on Datavail.

King acknowledged that Lacek received some commissions based on the Datavail deal as a matter of "[m]anagement discretion." And Lacek acknowledged in his deposition testimony that King, at some point, took over the Datavail project.

Again, the employment contract's terms governing the payment of commissions are sparse. The one clear metric is the registration of the salesperson in the CRM system "to ensure clarity of ownership." The record indicates that Lacek was connected to Datavail

in the CRM system, and that Evosys decided to limit his commissions as a matter of discretion or policy because King took over the account. The employment contract contained a clause covering other terms and conditions of employment. It is therefore possible that Evosys properly transferred the Datavail commissions to King. However, if the evidence is viewed in the light most favorable to Lacek, reasonable persons could reach different conclusions regarding whether Lacek is entitled to some commissions for his work on the Datavail account. Thus, there is a genuine issue of material fact regarding that issue, and summary judgment was inappropriate on the Datavail claim. *See DLH*, 566 N.W.2d at 71.

BOE Commissions

Lacek argues that he is entitled to additional commissions for his work on the BOE account. The district court did not address this claim in its order granting summary judgment. Regardless, we may affirm if Evosys is entitled to judgment as a matter of law. *See Mullins v. Churchill*, 616 N.W.2d 764, 770 (Minn. App. 2000) (affirming district court's grant of summary judgment, despite a district court's failure to address a claim, because respondents were entitled to summary judgment as a matter of law on that claim), *review denied* (Minn. Nov. 15, 2000); *see also Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (noting that appellate court will affirm summary judgment if it can be sustained on any grounds), *review denied* (Minn. Feb. 4, 1991).

As support for his contention that Evosys owes him additional commissions for his work on the BOE account, Lacek points to documents summarizing amounts collected from various accounts, argues that Evosys miscalculated the amount of revenue generated

from the BOE account, and asserts that Evosys ultimately received more revenue than initially calculated. Specifically, Lacek asserts that Evosys collected \$512,600.13 from BOE, miscalculated that amount as \$438,610, and ultimately expected to collect \$533,001.

Although the record includes documents containing financial information regarding the BOE account, they are insufficient to create a genuine issue of material fact regarding whether Evosys underpaid Lacek commissions for his work on that account. The documents lack the context and clarity necessary to establish the amount of money that Evosys received from the BOE account, let alone a claim that Lacek was underpaid commissions for his work on that account. Moreover, even though Lacek now claims that he is owed a percentage of nearly \$100,000 of miscalculated and expected BOE revenue, during his deposition, he testified that he was owed commissions on \$50,000 in BOE revenue. Likewise, in his memorandum in opposition to summary judgment, he argued that he was entitled to “\$1,250 in commission” for “the outstanding \$50,000 from the BOE deal” and that Evosys had collected “over \$626,000 from BOE,” but refused to pay “the remaining \$50,000 in commission from the \$553,000 deal.”

To survive summary judgment, the opposing party must “extract *specific*, admissible facts from the record that demonstrate that a genuine issue of material fact exists.” *Beecroft v. Deutsche Bank Nat’l Tr. Co.*, 798 N.W.2d 78, 82 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. July 19, 2011). Lacek has failed to do so. We therefore conclude that summary judgment was appropriate on the BOE claim.

III.

Lacek contends that the district court erred by denying his motion to amend his complaint to add a claim for age discrimination. Under Minn. R. Civ. P. 15.01, “[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served,” otherwise “a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

We review a district court’s denial of a motion to amend a complaint for an abuse of discretion. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). A district court should allow amendment unless the adverse party would be prejudiced, *Fabio*, 504 N.W.2d at 761, but the court does not abuse its discretion when it disallows an amendment where the proposed amended claim could not survive summary judgment, *Rosenberg*, 685 N.W.2d at 332.

Lacek’s claim for age discrimination is based on the Minnesota Human Rights Act (MHRA), which provides that an employer cannot discharge an employee based on age. Minn. Stat. § 363A.08, subd. 2(2) (2020). Under the MHRA, “The prohibition against unfair employment or education practices based on age prohibits using a person’s age as a basis for a decision if the person is over the age of majority” Minn. Stat. § 363A.03, subd. 2 (2020).

To survive summary judgment on an employment-discrimination claim under the MHRA, a plaintiff can use either of two methods: (1) the direct method of proof or (2) the three-part burden-shifting test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542

(Minn. 2001). Lacek intended to prove his claim under the three-part *McDonnell Douglas* test. Under that test, a plaintiff must first establish a prima facie case of discrimination. *Goins v. W. Grp.*, 635 N.W.2d 717, 724 (Minn. 2001). To make a prima facie case of age discrimination under the MHRA, a plaintiff usually must show: (1) he is a member of a protected group, (2) he was qualified for his position, (3) he was terminated, and (4) he was replaced by someone sufficiently younger to permit an inference of age discrimination. *See Ward v. Emp. Dev. Corp.*, 516 N.W.2d 198, 201 (Minn. App. 1994), *review denied* (Minn. July 8, 1994).

In denying Lacek's motion to amend, the district court reasoned that Lacek failed to provide "any factual support" for an age-discrimination claim. Specifically, Lacek did not allege that he was replaced by someone sufficiently younger or cite evidence that would support such an allegation. Lacek acknowledges the lack of evidence regarding the age of his replacement, but he argues that the district court erred by denying him additional discovery on that issue. Lacek does not offer any relevant legal argument or authority to support that position. On appeal, mere assertions of error without supporting legal authority or argument are waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). We therefore do not address Lacek's discovery argument.

"A denial of a motion to amend is proper when the movant fails to establish evidence to support the allegations the movant seeks to amend." *Davis v. Midwest Disc. Sec., Inc.*, 439 N.W.2d 383, 388 (Minn. App. 1989). Because Lacek did not provide any evidence showing that he was replaced by someone sufficiently younger, the district court did not

abuse its discretion by denying Lacek's motion to amend his complaint to add an age-discrimination claim.¹

In conclusion, we reverse the summary-judgment dismissal of Lacek's claim under Minn. Stat. § 181.13, as well as the dismissal of Lacek's claims for additional commissions for his work on the Actuant Phase 2 and Datavail accounts. We remand for further proceedings on those claims. But we affirm the summary-judgment dismissal of Lacek's claim for additional commissions for his work on the BOE account and the denial of Lacek's motion to amend his complaint to add a claim of age discrimination.

Affirmed in part, reversed in part, and remanded.

¹ The district court also concluded that Lacek's age-discrimination claim was untimely under Minn. Stat. § 363A.33, subd. 1(1) (2020). Having concluded that Lacek's motion to amend was properly denied because his claim was deficient, we need not address the timeliness of Lacek's motion.