

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0248**

Mariam Aromashodu,
Appellant,

vs.

Swarovski North America Limited, et al.,
Defendants,

Airport Retail Group, LLC, et al.,
Respondents.

Filed October 31, 2022
Affirmed in part, reversed in part, and remanded
Frisch, Judge

Hennepin County District Court
File No. 27-CV-20-13674

Jeffrey S. Storms, Newmark Storms Dworak LLC, Minneapolis, Minnesota; and

Jeffrey M. Montpetit, SiebenCarey, P.A., Minneapolis, Minnesota (for appellant)

Pablo Orozco, Chelsea J. Bodin, Christopher T. Ruska, Nilan Johnson Lewis PA,
Minneapolis, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and
Connolly, Judge.

SYLLABUS

The applicability of a qualified privilege in a defamation action based on race discrimination cannot be determined as a matter of law when a genuine dispute of fact exists as to whether the defamatory statement was motivated by discriminatory animus.

OPINION

FRISCH, Judge

Following the summary-judgment dismissal of her discrimination, defamation, and negligent-infliction-of-emotional-distress claims against an airport retailer, appellant argues that she produced record evidence sufficient to prove a prima facie case of discrimination, that the retailer's explanation for its action is a pretext for discrimination, that the retailer is not protected by a qualified privilege if its defamatory per se statement was motivated by discriminatory animus, and that she sustained sufficient damages to support her tort claim. Because we conclude that genuine issues of disputed fact exist as to the discrimination and defamation claims, we reverse in part and remand for trial on those claims. But because the record shows that appellant failed to produce evidence of severe emotional distress with attendant physical manifestations, we affirm summary judgment on the negligent-infliction-of-emotional-distress claim.

FACTS

We set forth the following facts in the light most favorable to appellant as the nonmoving party.

On July 31, 2019, appellant Mariam Aromashodu was shopping at a Swarovski jewelry store at the Minneapolis-St. Paul International Airport. The store is owned and managed by respondents Stellar Partners and Airport Retail Group, LLC (ARG). Aromashodu is a black, Muslim woman, and she was wearing a scarf covering on her head at the time. Respondent Laura Wilkins managed the store and was the only employee

present at the time. Two other customers, both white, were in the store at the same time as Aromashodu.

The store is relatively small at approximately 440 square feet. The store displays most products in a locked case. Some items are displayed in the front of the store and outside of the locked case. These products are located on a “self-service spinner,” which allowed customers to “pop out a box” to examine an item.

Aromashodu sought assistance from Wilkins to purchase earrings for her daughter. Wilkins showed Aromashodu three sets of earrings from the self-service spinner and placed the earrings on a store counter. Wilkins also showed Aromashodu the location of the spinner if Aromashodu wanted to look at other products.

Aromashodu made several trips between the spinner and the counter where Wilkins had placed the three sets of earrings. Eventually, Aromashodu decided to purchase one pair of earrings, and she returned the other two pairs to the spinner, where she encountered one of the two white customers standing next to the spinner. During this time, Wilkins assisted the third customer. Wilkins then turned her attention to Aromashodu to complete the purchase of the earrings. Aromashodu left the store to run some additional errands before boarding her flight.

After Aromashodu left the store, Wilkins noticed that earrings were missing from the self-service spinner. Wilkins contacted airport police to report a theft. She informed airport police that Aromashodu stole the missing earrings. By the time airport police had located Aromashodu, she had already boarded her flight and settled into her seat. Airport police boarded the flight, removed Aromashodu and her belongings from the plane,

searched the surrounding area on the plane, and then questioned her about the missing earrings. Aromashodu denied stealing the earrings. After searching Aromashodu and the surrounding area on the plane, police did not discover any stolen items but did find the earrings that Aromashodu purchased, along with the receipt for the purchase from the store.

Airport police brought Aromashodu back to the store to discuss the situation with Wilkins. By that time, Wilkins's manager and another supervisor had also arrived at the store. After some discussion, police identified several inconsistencies in Wilkins's report and determined that Aromashodu likely did not steal anything. Wilkins's manager assisted Aromashodu with finding and paying for a new flight home. After she returned home, Aromashodu reported feelings of mental distress and attended three counseling sessions to address her concerns. The missing earrings were never recovered.

In October 2020, Aromashodu filed a complaint against Stellar Partners, ARG, and Wilkins, alleging race and religious discrimination in a public accommodation under the Minnesota Human Rights Act (MHRA), defamation per se, and negligent infliction of emotional distress.¹ After discovery, all respondents moved for summary judgment on all claims, which the district court granted. Relevant to this appeal, the district court concluded that Aromashodu had failed to establish a prima facie case of discrimination, that the record did not contain evidence of pretext, that Wilkins's statement to police was protected by a qualified privilege, and that Aromashodu could not establish that she was in

¹ Aromashodu originally included as defendants the corporate retail entities that owned the Swarovski brand but later dismissed them from the case. She also originally included claims for intentional infliction of emotional distress and false imprisonment but does not challenge the dismissal of those claims on appeal.

the zone of danger to satisfy the first element of her claim for negligent infliction of emotional distress. Aromashodu appeals.

ISSUES

- I. Do genuine issues of disputed fact preclude summary judgment on Aromashodu's MHRA claim?
- II. Do genuine issues of disputed fact preclude summary judgment on Aromashodu's defamation per se claim?
- III. Do genuine issues of disputed fact preclude summary judgment on Aromashodu's negligent-infliction-of-emotional-distress claim?

ANALYSIS

Summary judgment is appropriate if “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. “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.” *Leeco, Inc. v. Cornerstone Bank*, 898 N.W.2d 653, 657 (Minn. App. 2017), *rev. denied* (Minn. Sept. 27, 2017). A material fact is one that will affect the outcome or result of a case. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). We review a grant of summary judgment de novo, viewing “the evidence in the light most favorable to the nonmoving party and resolv[ing] all doubts and factual inferences against the moving part[y].” *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted).

I. Genuine issues of disputed fact preclude summary judgment on Aromashodu's MHRA claim.

Aromashodu argues that her MHRA claim is not susceptible to resolution at the summary-judgment stage because material, disputed facts exist as to whether respondents discriminated against her due to her protected status. We agree.

The MHRA prohibits discrimination in a place of public accommodation on the basis of race or religion. Minn. Stat. § 363A.11, subd. 1(a)(1) (2020). A party may establish a discrimination claim under the MHRA using one of two evidentiary frameworks, either based on direct or circumstantial evidence. *Goins v. W. Grp.*, 635 N.W.2d 717, 722-24 (Minn. 2001); *Friend v. Gopher Co.*, 771 N.W.2d 33, 37 (Minn. App. 2009). The parties agree that Aromashodu's discrimination claim is based on circumstantial evidence. A party may establish a discrimination claim based on circumstantial evidence using the three-part framework established by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Goins*, 635 N.W.2d at 724; *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441-42 (Minn. 1983).

Under the *McDonnell-Douglas* framework, a party must first establish, by a preponderance of the evidence, a prima facie case of discrimination. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995). To establish a prima facie case of public-accommodation discrimination under the MHRA, a party must demonstrate that (1) the party is a member of a protected class, (2) the place of public accommodation treated the party differently, and (3) the different treatment was because of the party's membership in

a protected class. *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 63 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009).

If the party establishes a *prima facie* case of discrimination, the second part of the *McDonnell-Douglas* framework applies, and the burden shifts to the place of public accommodation to articulate a legitimate, nondiscriminatory reason for its actions. *Dietrich*, 536 N.W.2d at 323. If the place of public accommodation carries its burden, the third part of the *McDonnell-Douglas* framework applies, and the party must then prove, by a preponderance of the evidence, that the stated reasons for the actions of the place of public accommodation were not true reasons but instead amount to a pretext for discrimination. *Id.* Ultimately, whether discrimination occurred is a question of fact. *LaPoint v. Fam. Orthodontics, P.A.*, 892 N.W.2d 506, 514 (Minn. 2017).

A. Aromashodu established a *prima facie* case of discrimination.

Respondents do not dispute that Aromashodu is a member of a protected class and that she was treated differently than the two white customers in the store. Respondents argue that the district court properly entered summary judgment because the record is devoid of evidence that any disparate treatment of Aromashodu was motivated by her membership in a protected class. We disagree.

We emphasize that the evidence needed for a complainant to shift the burden to an alleged discriminator is not onerous. *See Dietrich*, 536 N.W.2d at 323. A party may establish the presence of a discriminatory motive through indirect evidence. *Minneapolis Police Dep't v. Kelly*, 776 N.W.2d 760, 766 (Minn. App. 2010) (citing *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202 (Minn. 1976)), *rev. denied* (Minn. Mar. 30, 2010).

Indirect evidence includes “(1) proof of a difference in treatment with individuals similarly situated who are of a different racial origin than the complainant; or (2) proof that the treatment of the complainant was so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation.” *Id.* at 766-67.

The record contains indirect evidence that respondents treated Aromashodu differently because of her membership in a protected class. At the time of the alleged incident, three customers were shopping in the small store: Aromashodu, who is black and Muslim, plus two white customers. Aromashodu testified that one of those customers was located in close proximity to the self-service spinner. Although Wilkins did not see any of the customers steal the allegedly missing earrings, she nevertheless reported to police that she was “certain Ms. Aromashodu was the one that stole the items.” Stated another way, Wilkins treated Aromashodu differently than the white customers in the store. This different treatment is indirect evidence of discrimination. *Id.* A fact-finder could determine that Wilkins’s treatment of Aromashodu was “so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation.” *Id.*

In addition, the record contains evidence that Wilkins provided conflicting accounts as to how she arrived at the conclusion that Aromashodu stole the earrings. While Wilkins acknowledged to police that Aromashodu had made a purchase at the store, Wilkins later reported to ARG that Aromashodu had not purchased anything. Wilkins testified that she never searched the store for the missing earrings and instead based her conclusion that they were missing on a visual observation only of the self-service spinner. But Wilkins later

testified that she checked everywhere in the store for the earrings after noticing that they were missing. Wilkins testified that after she noticed the missing earrings, she did not immediately believe that they were stolen—testimony that contradicts her report to ARG that she “immediately” became concerned about the missing product and “immediately” called her supervisor and the police and that she was certain that Aromashodu had stolen the earrings. These inconsistencies, explicitly noted by the police as a reason why they abandoned the theft investigation, are indirect evidence from which a reasonable fact-finder could conclude that Wilkins reported Aromashodu to the police because of her protected status and not for any non-discriminatory reason. *See Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir. 1998).

Taking all of this record evidence in the light most favorable to Aromashodu as the nonmoving party, we conclude that the district court erred in determining that Aromashodu had not met her burden to establish a prima facie case of discrimination.

B. Genuine issues of disputed fact exist as to whether the proffered reason for accusing Aromashodu of committing a crime was pretextual.

For purposes of this appeal, Aromashodu does not contest that respondents offered a legitimate, nondiscriminatory reason for their actions. But Aromashodu argues that genuine issues of disputed fact exist as to whether the stated rationale proffered by respondents is a pretext for discrimination. We agree that summary judgment is inappropriate on this record.

The record contains evidence from which a fact-finder could conclude that the proffered reason for reporting Aromashodu to the police was untrue. Taking the evidence

in the light most favorable to Aromashodu, as we must do at this procedural posture, Wilkins offered conflicting, shifting explanations as to why she accused Aromashodu of stealing the earrings, rather than either of the two white customers in the store. Wilkins reported to police that Aromashodu made a purchase at the store, but later told her employer that Aromashodu made no purchase. Wilkins told police that only one customer had been in the store with Aromashodu, but later said that two customers had been present in the store and that she had helped them the entire time that Aromashodu was also in the store.² Wilkins then told her employer that only one customer had been present in the store with Aromashodu. Wilkins reported that two pairs of earrings had been stolen, but later stated that three pairs of earrings were stolen. And, as noted above, Wilkins gave differing accounts as to how she discovered the merchandise was missing and how she conducted her investigation, if any. These inconsistencies are more than sufficient to create a genuine issue of disputed fact as to the underlying motivation to accuse Aromashodu of committing a crime. *See Hanson v. Dep't of Nat. Res.*, 972 N.W.2d 362, 376 (Minn. 2022) (explaining that “shifting reasons . . . may give rise to a fact issue about whether the later-stated reasons are pretextual”). While a fact-finder could reasonably conclude that Wilkins was not motivated by discriminatory animus and that she simply made an honest mistake, a fact-

² At her deposition, Wilkins stated that she learned that two other customers had been in the store with Aromashodu after reviewing security-camera footage. However, one of the store managers testified at their deposition that the cameras inside the store were not working that day, making it unclear how Wilkins could have reviewed the footage. At oral argument, counsel for respondents asserted that other footage from outside the store captured the occupants. But the deposition transcripts included in the record on appeal are not complete and contain no mention of any other cameras besides the nonfunctioning cameras located in the store.

finder could also conclude that these inconsistencies support a conclusion that Wilkins was not truthful about her motive. We do not make credibility determinations or weigh evidence at the summary-judgment stage. *Jepsen as Tr. for Dean v. County of Pope*, 966 N.W.2d 472, 492 (Minn. 2021). And because we resolve all doubts and inferences in favor of the nonmoving party, we conclude that the record contains genuine issues of disputed fact as to whether the stated reason for reporting Aromashodu was pretextual. Accordingly, we reverse the entry of summary judgment and remand to the district court for trial.

II. Genuine issues of disputed fact preclude summary judgment on Aromashodu's defamation per se claim.

Aromashodu argues that the district court disregarded material evidence regarding respondents' discriminatory motive in reporting a crime and thereby erred in concluding that respondents were entitled to a qualified privilege on her defamation per se claim. We agree.

A false accusation of a crime is defamatory per se. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 158 (Minn. App. 2007). But a speaker is not liable for defamation if a qualified privilege protects the defamatory statement and the privilege is not abused. *Larson v. Gannett Co.*, 940 N.W.2d 120, 131 (Minn. 2020). The privilege only applies if the statement is made in good faith, upon a proper occasion, with proper motive, and is based upon reasonable or probable cause. *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997). A qualified privilege can exist when an individual makes a good-faith report of suspected criminal activity to law enforcement. *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995). Whether a qualified privilege

applies is generally a question of law. *Bol*, 561 N.W.2d at 149. And we review de novo whether a defamatory statement is protected by a qualified privilege. *Kuelbs v. Williams*, 609 N.W.2d 10, 16 (Minn. App. 2000), *rev. denied* (Minn. June 27, 2000).

Wilkins accused Aromashodu of committing a crime, and Aromashodu claims that allegation is defamatory per se because it is false. But if Wilkins made her report in good faith and with a proper motive, the report, even if untrue, would be subject to a qualified privilege absolving her of liability. We acknowledge that Wilkins alleges that she made the report in good faith and with a proper motive. But at the summary-judgment stage of the proceedings, we consider the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving party. *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). Aromashodu presented evidence, detailed above, from which a fact-finder could conclude that Wilkins was motivated to accuse Aromashodu of committing a crime not by good faith or a proper motive, but instead by discriminatory animus. Summary judgment is not appropriate under these circumstances.³ We hold that the applicability of qualified privilege in a defamation action based on race discrimination cannot be determined as a matter of law where a

³ Other courts have determined that actions motivated by discriminatory motive are not entitled to qualified privilege or immunity. *See Parine v. Levine*, 274 F. Supp. 268, 269 (E.D. Mich. 1967) (“But it is unnecessary here to delineate the scope of the qualified privilege, since the plaintiff alleges a purposeful discrimination based on race which, if proved, would overcome the qualified privilege however defined.”); *Austin v. Long*, 779 F.3d 522, 523-25 (8th Cir. 2015) (affirming district court’s denial of qualified immunity for head prosecutor when fact dispute existed at summary judgment as to whether deputy prosecutor was fired on the basis of his race); *Goodwin v. Cir. Ct. of St. Louis Cnty., Mo.*, 729 F.2d 541, 545-46 (8th Cir. 1984) (holding that no good-faith defense based in qualified immunity could exist if discriminatory intent is proved).

genuine dispute of fact exists as to whether the defamatory statement was motivated by discriminatory animus. We therefore reverse the entry of summary judgment on the defamation per se claim and remand to the district court for the fact-finder to determine, among other things, whether the statement was made in good faith or with a proper purpose.

III. The district court properly granted summary judgment on Aromashodu's claim for negligent infliction of emotional distress.

Lastly, Aromashodu argues that the district court erred by granting summary judgment on her claim for negligent infliction of emotional distress. To prevail on a negligence claim, a party must prove: “(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury.” *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). A claim for negligent infliction of emotional distress requires a party to prove three additional elements: that the party “(1) was within the zone of danger of physical impact created by the defendant’s negligence; (2) reasonably feared for her own safety; and (3) consequently suffered severe emotional distress with attendant physical manifestations.” *Id.* (quotation omitted). However, a party who establishes a claim for defamation need not prove the “zone of danger” element. *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902, 907 (Minn. App. 1987), *rev. denied* (Minn. Nov. 13, 1987).

We have already concluded that genuine issues of disputed fact preclude summary judgment on Aromashodu’s defamation claim. She argues that this result necessarily requires reinstatement of her claim for negligent infliction of emotional distress because a material fact question exists as to whether defamation occurred and, consequently, whether

Aromashodu needs to establish she was in the “zone of danger” under *Bohdan*. Although the district court relied upon this rationale in granting summary judgment, we may affirm a grant of summary judgment if such a result can be sustained on any grounds. *Edwards v. Hopkins Plaza Ltd. P’ship*, 783 N.W.2d 171, 175 (Minn. App. 2010).

Aromashodu has not produced evidence that she suffered “severe emotional distress with attendant physical manifestations,” the third required element of a claim for negligent infliction of emotional distress. *Engler*, 706 N.W.2d at 767. Although the record contains evidence that Aromashodu attended three counseling sessions and complained of fear of going out in public and difficulty concentrating, the reports in the record do not describe these concerns as severe. And although the record indicates that Aromashodu reported trouble sleeping, the record does not contain evidence attributing this condition to the incident. Because the record lacks evidence of the severity of harm sustained by Aromashodu, dismissal of the negligent-infliction-of-emotional-distress claim at summary judgment is appropriate. *See State by Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. App. 1988), *rev. denied* (Minn. May 4, 1988). Thus, on our de novo review, we affirm the district court’s grant of summary judgment for this claim.

DECISION

Because the record contains genuine issues of disputed fact as to whether respondents engaged in public-accommodations race discrimination against Aromashodu or were motivated by discriminatory animus when making defamatory statements about her, summary judgment was not proper and we reverse the district court’s grant of summary judgment on those two claims and remand those claims to the district court for trial.

Because the record does not contain the required damages evidence to sustain Aromashodu's negligent-infliction-of-emotional-distress claim, we affirm the district court's summary-judgment order as to that claim.

Affirmed in part, reversed in part, and remanded.