

*This opinion is nonprecedential except as provided by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
A24-0065**

Hugh McTavish,
Appellant,

vs.

Life Time Fitness, et al.,
Respondents.

**Filed August 26, 2024
Affirmed
Ross, Judge**

Ramsey County District Court
File No. 62-CV-23-3782

Hugh McTavish, Pine Springs, Minnesota (self-represented attorney)

William L. Davidson, Brian A. Wood, John A. Knapp, Lind, Jensen, Sullivan & Peterson,
P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Halbrooks,
Judge.*

NONPRECEDENTIAL OPINION

ROSS, Judge

Gubernatorial candidate and Life Time Fitness member Hugh McTavish posted
campaign leaflets on the cars parked in the lot of Life Time's Bloomington facility. After

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

McTavish refused Life Time's directive to remove them, Life Time first suspended and then terminated McTavish's membership. McTavish sued Life Time and a Life Time employee under Minnesota common law and implicitly under 42 United States Code, section 1983, alleging that their actions breached Life Time's membership contract with McTavish and violated his constitutional right to free speech. The district court awarded summary judgment to Life Time and dismissed McTavish's complaint. Because the parties' membership contract granted Life Time unilateral discretion to terminate McTavish's membership "for conduct Life Time Fitness determines to be improper or contrary to the best interests of Life Time Fitness" and Life Time implicitly deemed McTavish's conduct improper or against its interests, McTavish's contract claim fails as a matter of law. And because Life Time is not a state actor and its employee did not terminate McTavish's membership "under color of any statute, ordinance, regulation, custom, or usage" as required for a claim under section 1983, his constitutional claim also fails as a matter of law. We therefore affirm the district court's summary-judgment decision.

FACTS

Appellant Hugh McTavish campaigned to become governor in 2022 and, to promote his candidacy, placed leaflets on cars parked in the parking lot of respondent Life Time Fitness's Bloomington facility. McTavish then drove toward his home and received a telephone call from a Life Time manager about 30 minutes into his commute. The manager told McTavish that Life Time did not allow leafletting, that club members had complained about his leafletting, and that McTavish must return and remove the leaflets from the parking lot. McTavish refused.

Two days later respondent Babette McLagan, a different Life Time manager, informed McTavish that Life Time had suspended his membership for three months because he distributed the leaflets without authorization. Life Time then terminated McTavish's membership after he continued to use the facility despite the suspension but offered to reinstate him if he agreed to comply with Life Time's policy prohibiting soliciting on the premises.

McTavish sued Life Time and McLagan in a civil complaint that claimed breach of contract and violation of McTavish's First Amendment right to free speech. Life Time and McLagan moved for summary judgment, and the district court granted the motion in a cursory order, dismissing the complaint. McTavish appeals.

DECISION

McTavish challenges the district court's order granting summary judgment to Life Time and McLagan. We review a district court's summary-judgment decision *de novo* "to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted); *see also* Minn. R. Civ. P. 56.01. McTavish contests the summary-judgment decision as to both his breach-of-contract and First Amendment claims. For the following reasons, we hold that no genuine issues of material fact exist and that Life Time and McLagan are entitled to judgment as a matter of law.

I

We first address McTavish's breach-of-contract claim against McLagan. Although in some circumstances a person who is not a party to a contract can be liable for interfering

with the contract, *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998), she generally cannot be liable for actually breaching the contract, *see Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 439 (Minn. App. 2004), *rev. denied* (Minn. June 29, 2004) (stating the general rule that “nonparties to a contract acquire no rights or obligations under it”). McTavish’s complaint alleges that “[t]he Defendant Life Time and [McTavish] had entered into a valid membership contract” and that “[t]he Defendants unilaterally and without good cause breached the membership contract by cancelling the membership.” McLagan is not a party to or named in McTavish’s membership agreement with Life Time. Neither his argument to the district court opposing summary judgment nor his argument to this court on appeal included any legal theory under which McLagan might be liable for breaching his membership agreement. McLagan is therefore entitled to judgment as a matter of law on McTavish’s contract claim.

Turning to summary judgment on the contract claim as applied to Life Time, McTavish argues first that, if he had been allowed to conduct discovery before responding to Life Time’s summary-judgment motion, he might have uncovered facts that support his claims. He particularly posits that discovery would have allowed him to explore whether Life Time had some motive other than the one it has asserted as its reason for terminating his membership. We interpret McTavish’s argument as contending that the district court improperly refused to defer considering summary judgment until the parties engaged in more discovery. We review a district court’s decision to grant summary judgment without first allowing a party to conduct discovery for an abuse of discretion. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010). A party who believes he cannot,

without discovery, present facts necessary to oppose a summary-judgment motion must so inform the district court by affidavit to invoke the court's authority to defer considering the motion or to allow time for discovery. Minn. R. Civ. P. 56.04. McTavish never provided the district court a rule-56.04 affidavit seeking additional time for discovery or asking the court to defer ruling on the motion. We will not fault the district court for failing to provide a discovery period that McTavish never sought. Because McTavish did not seek discovery under the rule, we cannot conclude that the district court abused its discretion by deciding the summary-judgment motion without affording additional time for discovery.

McTavish argues that summary judgment is nonetheless not appropriate because the undisputed facts do not foreclose the possibility that Life Time breached the membership contract. A breach of contract includes a contracting party's legally inexcusable failure to perform a promise the contract obligates the party to perform. *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). McTavish contends that Life Time breached his membership agreement by terminating his membership. He maintains specifically that Life Time had a contractual duty to allow him to use Life Time's facilities as a member so long as he paid his membership dues. But the membership agreement empowers Life Time to terminate McTavish's membership "for conduct Life Time Fitness determines to be improper or contrary to the best interests of Life Time Fitness." According to a document that Life Time submitted as its "Guest and Club Policies," Life Time members may "not solicit-whether in person or in writing-any members, guests, or Team Members on the premises . . . , including but not limited to solicitations for political . . . purposes." A Life Time employee testified by affidavit that "Life Time does not permit the

distribution of any flyers on its property, regardless of the message on the flyer, as impermissibly putting flyers on vehicles in the parking lot leads to litter and is a nuisance to Life Time’s members and employees.” McTavish presented no evidence contradicting this evidence, which we interpret as describing conduct that Life Time deems “improper or contrary to [its] . . . best interests” under the membership agreement.

During his argument in the district court, McTavish did question whether Life Time had established that the written antisolicitation policy had been in effect at the Bloomington facility at the time of his leafletting. But the argument fails to identify a disputed material fact. Although McTavish asserts on appeal that Life Time may have harbored some different reason for terminating his agreement, the assertion is not enough to withstand summary judgment. A party who opposes summary judgment by suggesting that a material fact is in dispute “[can]not avoid summary judgment by resting on mere assertions” and can “instead . . . avoid summary judgment only by producing substantial evidence creating a disputed factual issue to be resolved by a fact-finder.” *MacDonald v. Brodkorb*, 939 N.W.2d 468, 476 (Minn. App. 2020). McTavish’s only evidence submitted was his own affidavit, which tends to support Life Time’s asserted reason for the termination. His affidavit states that, about a half hour after he finished leafletting the cars, he “received a telephone call from someone from Life Time Fitness demanding that [he] return to the Bloomington club to pick up the flyers that had been discarded in the parking lot and remove the flyers that were on cars under the windshield wipers in the parking lot.”

And McTavish’s civil complaint more specifically acknowledges that he “asked an attorney-friend to contact Defendant McLagan about the reasons behind his cancelled

membership” and that she “sent [him] two paragraphs of isolated text that forbade solicitation on Lifetime property, and specifically defined political solicitation as included in that provision.” The factual assertions in his civil complaint therefore belie his suggestion that the written policy Life Time provided was not in effect when he leafletted the cars at the Bloomington facility. The complaint emphasizes that “[t]he language prohibiting solicitation [is,] however, actually part of a purported ‘policy’ and not part of the original contract that [McTavish] had signed.” But this emphasis distinguishing the policy from the membership agreement misses the point. The membership agreement establishes that Life Time may terminate a membership based on conduct that Life Time determines to be improper, and the policy declares that political solicitation on Life Time premises is conduct that Life Time formally declared to be improper. As Life Time highlights and McTavish concedes, Life Time gave him the opportunity to maintain his membership despite his improper conduct first by returning to the premises and removing the leaflets and later by promising to abide by the policy. McTavish refused both offers, leaving him subject to Life Time’s decision to exercise its right to terminate his membership. On the undisputed facts, we hold that Life Time is entitled to summary judgment on McTavish’s breach-of-contract claim.

II

We turn to McTavish’s First Amendment claim. The First Amendment expressly prohibits congress from “abridging the freedom of speech.” U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment incorporates this right so that it extends also to protect individuals from state governmental encroachment on their right to free speech.

Gitlow v. New York, 268 U.S. 652, 666 (1925). McTavish maintains that Life Time’s decision to terminate his membership based on his political leafletting constitutes unconstitutional retaliation against his right to free speech. It is true that retaliation for engaging in protected speech can form the basis of a First Amendment claim. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006). But the Constitution’s protection of individual rights applies only to prohibit governmental infringements, not to prohibit alleged infringements by private persons like Life Time and McLagan. *See Virginia v. Rives*, 100 U.S. 313, 318 (1879); *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999). The federal law that imposes civil liability on persons who deprive others of a constitutional right relatedly applies only against persons who act “under color of any statute, ordinance, regulation, custom, or usage, of any State.” 42 U.S.C. § 1983. (Although McTavish’s complaint did not cite section 1983 as the vehicle of his constitutional claim, the parties have argued as though he did, and we therefore do not consider what, if any, effect the omission might have on the summary-judgment decision.) McTavish’s First Amendment claim fails under this state-action requirement because Life Time is not a federal or state governmental body and McLagan did not act under color of a state or local law.

McTavish tries to avoid dismissal based on the lack of state action by relying on his allegation—which we take as true in this summary-judgment analysis—that McLagan told him that leafletting in the Life Time lot violated a Bloomington ordinance. McTavish’s reliance on McLagan’s rationale is unavailing. Life Time’s policy prohibiting political solicitation stands independent of any city ordinance. As McTavish emphasizes, Bloomington has no such ordinance. More important here, whether the city has an

ordinance that restricts political speech is not relevant to Life Time's right as a private entity to restrict political speech on its premises. Nor does McLagan's reliance on a city ordinance make her personally liable under section 1983. Whether a person acted "under the color of law" generally depends on whether she acted or purported to act in the performance of her official duties authorized under the law. *West v. Atkins*, 487 U.S. 42, 49–50 (1988). A person who is not a governmental official also might act under color of law by jointly participating with a governmental official. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). McTavish does not offer any evidence suggesting that McLagan was purporting to act as a governmental official or in collaboration with a governmental official. Based on McTavish's allegations and the undisputed facts, McLagan was acting to curtail McTavish's leafletting behavior in her capacity as a Life Time employee, not as a governmental agent. That she referenced a local ordinance does not change her status as a private person acting on behalf of her private employer or transform Life Time into a state actor. Life Time and McLagan are therefore entitled to judgment as a matter of law on McTavish's First Amendment claim.

Affirmed.