STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1219

Tunde Oni,
Appellant,

vs.

Target Corporation,
Respondent.

Filed May 3, 2021
Affirmed
Cochran, Judge

Hennepin County District Court
File No. 27-CV-19-11468

Daniel Gray Leland, Leland Conners PLC, Minneapolis, Minnesota (for appellant)

Katie M. Connolly, Nilan Johnson Lewis PA, Minneapolis, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Gaïtas, Judge; and Peterson, Judge.*

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Respondent-employer terminated appellant's employment after appellant tested positive for alcohol during work hours. Appellant brought an action in the district court, alleging breach of contract and violations of the Minnesota Drug and Alcohol Testing in

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

the Workplace Act (DATWA), Minn. Stat. §§ 181.950-.957 (2020). The district court granted respondent-employer's motion for summary judgment and denied appellant's motion for partial summary judgment. Appellant asks this court to reverse the district court's summary-judgment order, arguing that the district court erred by (1) concluding that respondent-employer did not violate DATWA by disciplining appellant, and (2) rejecting appellant's argument that respondent-employer's policy does not comply with DATWA on its face. Because we conclude that appellant's first argument fails to demonstrate a violation of DATWA and that appellant forfeited his second argument, we affirm.

FACTS

In August 2017, respondent-employer Target Corporation (Target) hired appellant Tunde Oni as a seasonal, at-will employee at its Fridley distribution center. Oni's employment was limited to 175 days, but Oni was eligible for consideration as a regular employee following the end of his seasonal employment. As part of his employment offer, Oni signed Target's "Minnesota Distribution Center Drug Free Workplace Policy" (Target's DFW Policy).

On October 30, 2017, Oni arrived at the distribution center at approximately 6:00 p.m. for a 12-hour overnight shift. About two hours later, a manager called Oni into a conference room and informed Oni that his breath smelled like alcohol. Oni was then asked to take a drug and alcohol test, and he agreed. The testing involved both a urine sample and a blood sample. Before taking the test, Oni again signed Target's DFW Policy and also signed a "Drug Test Consent" form, in which he acknowledged that he received a

copy of Target's DFW Policy. Following the test, Oni was placed on unpaid leave while he awaited the results.

Through Target's third-party testing provider First Advantage, Target sent Oni's blood sample to Labcorp/MedTox Laboratories in St. Paul. Oni's sample tested positive for alcohol and showed an alcohol concentration of 0.014. The testing laboratory informed Target of Oni's positive test result on November 15, 2017.

Also on November 15, 2017, a Target human resources (HR) representative called Oni and requested an in-person conference at the distribution center. The parties met the following day, and the HR representative presented Oni with: a copy of the test result report, a document titled "Confidential Corrective Action," and a letter explaining that both an initial test and a confirmatory test had returned a positive result for alcohol. The letter further explained that because of Oni's positive result, he "may be subject to corrective action, up to and including termination." The HR representative then informed Oni of options he could take to avoid termination. As also explained in the letter and the "Confidential Corrective Action" document, Oni could avoid termination by opting to participate in drug and/or alcohol counseling or a rehabilitation program. And the HR representative explained to Oni that if he chose not to participate in rehabilitation services, he could voluntarily resign, which would make him eligible for rehire at Target in the future. Oni refused both options, and Target terminated his employment that day.

Oni filed a complaint alleging that Target violated DATWA and requesting "backpay, front pay, and emotional distress damages." He argued that Target failed to test in accordance with DATWA (Count I), failed to comply with post-testing obligations

(Count II), and failed to use a properly accredited testing facility (Count III). Oni also alleged breach of contract (Count IV). Relevant to this appeal, Count I of Oni's complaint alleged that Target violated one of DATWA's sections, Minn. Stat. § 181.951, subd. 1(b) (2020). Oni argued that based on the language of the policy, Target's DFW Policy subjects employees to discipline only if an alcohol test results in an alcohol concentration of 0.04 or higher. And, because Target disciplined Oni based on an alcohol concentration of 0.014, Oni argued that Target violated section 181.951, subdivision 1(b), by not testing in accordance with its written policy.

Target moved for summary judgment on all claims, and Oni moved for partial summary judgment on his claim in Count I that Target failed to test in accordance with DATWA. Oni's motion for partial summary judgment contained an additional theory, which Oni had not set forth in his complaint. There, Oni argued that Target violated DATWA because its written policy inaccurately stated that employees can be terminated for a first violation of Target's DFW Policy and that Target has the discretion to refer employees to rehabilitation services if they test positive for drugs or alcohol.

On July 22, 2020, the district court issued an order denying Oni's motion on Count I and granting Target's motion on all counts. Relevant to this appeal, the district court determined that Count I of Oni's complaint failed as a matter of law. The court concluded that the plain language of Target's DFW policy permitted Target to discipline Oni for "testing positive" for alcohol and did not limit discipline to positive results of 0.04 or more. The district court further concluded that the additional theory Oni raised with his summary-judgment motion was not properly before the court because Oni had failed to

plead that theory in his complaint. Accordingly, the district court denied Oni's partial motion for summary judgment on Count I and granted Target's motion for summary judgment on all counts.

Oni appeals.

DECISION

On appeal, Oni challenges only the district court's summary-judgment decision as to Count I of his complaint. He makes two separate legal arguments as to why he believes that the district court erred by denying his motion and granting Target's motion for summary judgment as to that count.

Summary judgment "is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 189-90 (Minn. 2019) (quotation omitted). Appellate courts review a grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). In conducting this review, appellate courts view the evidence in the light most favorable to the nonmoving party. *Henson*, 922 N.W.2d at 190. This court "may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). We address each of Oni's arguments in turn.

I. Oni's claim that Target violated section 181.951, subdivision 1(b), of DATWA fails as a matter of law.

Oni argues that Target violated section 181.951, subdivision 1(b), of DATWA by disciplining him in contravention of its written policy. He contends that the district court

erred by concluding, to the contrary, that Target complied with its policy and therefore complied with DATWA. Because we conclude that Oni has failed to demonstrate a violation of section 181.951, subdivision 1(b), we discern no error in the district court's summary-judgment dismissal of Oni's claim.

DATWA regulates the administration of drug and alcohol testing in the workplace. *Williams v. Nat'l Football League*, 794 N.W.2d 391, 395 (Minn. App. 2011). Under the statute, employers are prohibited from "request[ing] or requir[ing]" employees to undergo drug and alcohol testing except as authorized by section 181.951. Employers are required to have a testing policy that sets forth the minimum information listed in section 181.952, subdivision 1, and employers must provide employees with notice of their testing policies that complies with section 181.952, subdivision 2. Employers are also subject to a number of "[r]eliability and fairness safeguards" under section 181.953, which include limitations on an employer's ability to terminate an employee. DATWA allows for damages when an employee is injured by a violation of sections 181.950-.954 and "any other equitable relief" that the district court determines is "appropriate" to remedy such violations. Minn. Stat. § 181.956, subds. 2, 4.

Oni argues that Target violated section 181.951, subdivision 1(b), of DATWA. That subdivision provides:

> An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory

> which participates in one of the programs listed in section 181.953, subdivision 1.

Minn. Stat. § 181.951, subd. 1(b). Oni does not allege that Target violated this section by failing to include in its policy the information listed in section 181.952. Nor does he argue that Target's testing was not conducted by a testing laboratory that complies with section 181.952, subdivision 1. Rather, Oni argues that Target violated subdivision 1(b) by failing to comply with Target's DFW Policy after he was tested when it disciplined him for a 0.014 test result. In Oni's view, the language of Target's DFW Policy prohibited Target from disciplining him for an alcohol concentration below 0.04. He asserts that because his termination violated Target's own discipline policy, Target failed to administer his test "pursuant to" its written policy as required by section 181.951, subdivision 1(b). Target, in contrast, argues that even if Oni's interpretation of Target's DFW Policy is correct and Target violated the policy when it terminated Oni, Target did not violate section 181.951, subdivision 1(b), because that section pertains only to "*pre*-testing requirements," and not to post-testing discipline. We agree with Target that section 181.951, subdivision 1(b), does not apply to post-testing discipline.

When the intent of the legislature is clear from a statute's plain and unambiguous language, we interpret the statute according to its plain meaning. *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 550 (Minn. 2016). Here, the language of section 181.951, subdivision 1(b), is plain and unambiguous. It sets forth two requirements with which employers must comply in order to "request or require" employees to undergo drug or alcohol testing: (1) "*the testing* [must be] done pursuant to a written drug and alcohol

testing policy that contains the minimum information required in section 181.952" and (2) "*the testing* . . . [must be] conducted by a testing laboratory" that complies with the requirements of section 181.953, subdivision 1. Minn. Stat. § 181.951, subd. 1(b) (emphasis added). Based on this plain language, subdivision 1(b) pertains only to an employer's drug and alcohol *testing* of employees and has no bearing on an employer's post-testing disciplinary actions.

Oni has a different interpretation of subdivision 1(b). Based on the language in subdivision 1(b) requiring employers to test employees "pursuant to" a written policy, Oni appears to argue that a violation of *any* provision of the employer's written policy—including provisions relating to disciplinary actions—would render unlawful the employer's testing of that employee under subdivision 1(b). But Oni's interpretation of the statute is unreasonable in light of the plain and unambiguous language of subdivision 1(b).[1]

Because we conclude that section 181.951, subdivision 1(b), does not provide a basis for Oni's claim, we need not address whether Target violated Target's DFW Policy when it disciplined Oni for an alcohol concentration of 0.014. The district court did not err by denying Oni's motion for partial summary judgment on Count I of his complaint or by granting summary judgment in favor of Target on that count.

[1] We note that no provision of DATWA requires that an employee's positive drug or alcohol test result be above a certain level for that employee to be disciplined.

II. Oni forfeited his argument that Target's policy violates DATWA on its face.

Oni further argues that Target violated DATWA because Target's DFW Policy contravenes the statute on its face. Target contends that Oni forfeited this theory because he did not plead it in his complaint. We agree with Target.

"It is fundamental that a party must have notice of a claim against him and an opportunity to oppose it before a binding adverse judgment may be rendered." *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). "A [district] court, therefore, is required to base relief on issues either raised by the pleadings or litigated by consent." *Id.* In reviewing a district court's decision, the court of appeals "must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). This principle applies where a party "rais[es] the same general issue litigated below but under a different theory." *Id.*

Oni's motion for partial summary judgment contained an additional legal theory, which was not set forth in Oni's complaint. As part of his written argument in support of his motion on Count I, Oni asserted that Target violated DATWA because its written policy inaccurately stated that employees can be terminated for a first violation of Target's DFW Policy and that Target has the discretion to refer employees to rehabilitation services if they test positive for drugs or alcohol. Oni based this argument on both section 181.951, subdivision 1, and section 181.953, subdivision 10, of DATWA. In his memorandum, he appeared to argue that section 181.951, subdivision 1, requires employers to accurately

disclose the restrictions on employee discipline contained in section 181.953, subdivision 10.

In denying Oni's motion for partial summary judgment on Count I of his complaint and granting Target's motion, the district court concluded that Oni's additional alleged violation of DATWA was not properly before the court because Oni had failed to plead the violation in his complaint. The court determined that "the only violation alleged in Count 1 is that [Target] violated Section 181.951, subd. 1(b) when it disciplined [Oni] without regard to the 0.04 [alcohol concentration] limit provided in the DFW Policy." Because Oni failed to raise the additional violation in his complaint, the district court concluded that it "cannot grant judgment in favor of [Oni] on Count 1 based on violations not alleged."

On appeal, Oni does not challenge, or even acknowledge, the district court's decision that he forfeited the claim, but rather argues the claim on its merits. And, on appeal, Oni appears to change the statutory basis for his claim—where his argument to the district court focused solely on sections 181.951, subdivision 1, and 181.953, subdivision 10, his argument on appeal incorporates an argument that Target failed to comply with the requirements of section 181.952, subdivision 1(4). He now argues that section 181.952, subdivision 1(4)—which requires an employer's written policy to contain "any disciplinary or other adverse personnel action that may be taken" based on a positive test—when read together with section 181.951, subdivision 1(b), "prohibit[s] an employer from requesting or requiring an employee to undergo a drug/alcohol test if the employer's testing policy does not state the employee's rights under DATWA as set forth in section 181.953, subdivision 10, in the event of a first-positive test."

Because Oni failed to raise this claim in his complaint and the parties did not agree to litigate the issue by consent, the district court properly concluded that Oni had forfeited the issue. *See Folk*, 336 N.W.2d at 267. And Oni now improperly attempts to argue the issue under a slightly different theory without addressing why he believes the district court erroneously concluded that he had failed to raise the claim in his complaint. *See Thiele*, 425 N.W.2d at 582 (explaining that an appellate court typically will not review "the same general issue litigated below but under a different theory"). The district court did not err by declining to consider the unpleaded theory in granting summary judgment in favor of Target.

Affirmed.