STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0179

Amy Sweasy Tamburino,
Appellant,

vs.

Michael O. Freeman,
Respondent,

David Hough, et al.,
Respondents.

Filed December 16, 2024
Affirmed in part, reversed in part, and remanded
Bentley, Judge

Hennepin County District Court
File No. 27-CV-22-16364

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Considered and decided by Bentley, Presiding Judge; Cochran, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

Appellant Amy Sweasy Tamburino (Sweasy) challenges the summary-judgment dismissal of her claims against respondents Hennepin County and Michael O. Freeman. We conclude that there are genuine issues of material fact that preclude summary judgment on Sweasy's claims against the county for breach of a settlement agreement and for violation of the Minnesota whistleblower act, Minn. Stat. § 181.932 (2022). But we conclude that summary judgment was properly granted on Sweasy's claims against the county and Freeman for breach of the implied covenant of good faith and fair dealing and for fraudulent inducement. We therefore affirm in part, reverse in part, and remand to the district court for further proceedings.

FACTS

The claims at issue in this appeal stem from Sweasy's employment relationship with the county and her subsequent separation from that employment. The following facts, taken from the summary-judgment record and stated in the light most favorable to Sweasy, frame our consideration of the issues raised on appeal.

Sweasy was a prosecutor in the Hennepin County Attorney's Office until she resigned in May 2023. Freeman was the Hennepin County Attorney until he retired at the end of 2022. Freeman hired Sweasy as an assistant county attorney in 1996, promoted her to senior assistant county attorney in 2007 and to managing assistant county attorney in 2019, and appointed her to head the Community Prosecution Division in 2020. Sweasy had

substantial experience in violent-crime and use-of-deadly-force cases, and Freeman asked her to "be a key person in the office, trying major cases and major-police-involved cases."

In 2020, Sweasy drafted the initial criminal complaint against Officer Derek Chauvin for the murder of George Floyd (the Chauvin complaint). Freeman also expected Sweasy to draft charges in a complaint against three other involved officers, but Sweasy avers that she "believed Hennepin County was proceeding with a prosecution of [those] three individuals in violation of Minnesota Rules of Professional Responsibility 3.8(a)." She also disagreed with a decision to add additional charges against Chauvin. Sweasy conveyed these views to Freeman, and she withdrew from the matters (the Floyd matters). Freeman then told her, "I'm worried about your career now," and engaged in conduct that Sweasy perceived as retaliatory, including passing her over for a promotion to head the Adult Prosecution Division and precluding her from handling use-of-deadly-force cases.[1]

In August 2021, Sweasy filed charges of discrimination with the Minnesota Department of Human Rights against the county and Freeman (together, the MDHR charge). In the MDHR charge, Sweasy described the circumstances relating to her withdrawal from the Floyd matters. She claimed that Freeman had made sexist remarks and treated her less favorably than two male attorneys who had also expressed their unwillingness to work on the Floyd matters. She asserted that neither of the male attorneys suffered retaliation and that Freeman appointed one of them to manage the Adult Prosecution Division in August 2021, even though Sweasy was more qualified.

[1] Freeman denies making the statement and asserts nonretaliatory reasons for not assigning Sweasy to head the Adult Prosecution Division.

In December 2021 and January 2022, Sweasy, the county, and Freeman engaged in mediation on the claims alleged in the MDHR charge. By this time, it was known that Freeman would not seek reelection in November 2022. During the mediation, Sweasy proposed that she be reclassified as a principal attorney, a permanent civil service position that would provide her with additional job security. She understood at that time that she "would be the only one and that [she] would have that title, the responsibilities, and the benefits of that job into and beyond the end of 2022." But Sweasy did not negotiate to be the only principal attorney in the Hennepin County Attorney's Office because she "didn't think [she] needed to" and "[b]ecause the other side wouldn't agree to it." She nevertheless asserts that the county and Freeman knew that such exclusivity was important to her, based in part on an email chain between the county's counsel and the mediator, which had been forwarded to Sweasy's counsel.

In the email chain, the county's counsel made a settlement offer with terms including that "[Sweasy] is promoted to Principal Attorney, essentially guaranteeing her employment, salary, and protection from demotion to senior attorney under the new elected [county attorney]. Work assignments, as described [in the offer], can only be guaranteed through December 2022." The mediator responded, asking: "Is the net-net that she cannot be removed as a principal attorney without just cause?" The county's counsel responded: "You are correct on the net-net, she has job security now in a management role, which none of the other peers . . . have. All the other managers are subject to demotion by the next County Attorney."

In April 2022, the parties executed the settlement agreement. In exchange for releasing any claims against the county and Freeman up to that time, Sweasy received a monetary payment, additional paid time off, and the county's agreement to reclassify Sweasy as a principal attorney and create a Complex Prosecution Unit (the CPU) that she would run. For the remainder of 2022, Sweasy would report only to Criminal Chief Deputy County Attorney Dan Mabley, who would make staffing and caseload decisions for the CPU. The settlement agreement provided that Freeman would not "interfere with Mabley's decisions regarding staffing of the Unit." Pursuant to the terms of the settlement, Mabley sent an office-wide email announcing that Sweasy had been made a principal attorney and would lead the new CPU.

In May 2022, Freeman requested that six other managing attorneys be reclassified as principal attorneys. Freeman had discussed his intent to reclassify the other managing attorneys with Mabley and the other chief deputy county attorney before the settlement agreement was executed. But Sweasy did not learn of Freeman's intent until May 19, 2022, when he sent an email to Sweasy and the six other managing attorneys to "formally announce to you and the office that you have been reclassified as a Principal Attorney." Had she known of the intent to reclassify the other managing attorneys, Sweasy would not have agreed to the settlement agreement.

Following the settlement and through the end of 2022, Sweasy ran the CPU under Mabley's supervision. During that time, Freeman engaged in conduct that Sweasy asserts interfered with the staffing and caseload of the CPU. In particular, Freeman expressed to Mabley his belief that a particular senior attorney should not be assigned to the CPU. And

Freeman advised another attorney that it would not be good for his career to apply for a position in the CPU. But the senior attorney was assigned to the CPU, and the other attorney applied but was not selected for the unit because of a lack of experience. At one point, another attorney, based on discussions with Freeman, sent an email directing that the head of the Adult Prosecution Division be involved in selecting cases for the CPU. Mabley later overrode that direction.

Sweasy also asserts that she encountered hostility from Freeman and others within the county attorney's office. According to Mabley, the conflict between Freeman and Sweasy over her withdrawal from the Floyd matters was "never resolved" and resulted in Freeman distrusting Sweasy and denying proposals associated with her. The head of the Adult Prosecution Division told others that the CPU was not "real" and discouraged attorneys from applying to work in the CPU.

Sweasy commenced this litigation in November 2022, while still heading the CPU. She named Freeman, the county, and County Administrator David Hough as defendants and asserted claims for breach of the settlement agreement, tortious interference with contract, fraud and fraudulent inducement, whistleblower retaliation, civil conspiracy, and breach of the implied covenant of good faith and fair dealing. In the initial complaint, these claims were based primarily on Freeman's reclassification of other managing attorneys as principal attorneys and his alleged interference with the staffing and caseload of the CPU.

In January 2023, Mary Moriarty succeeded Freeman as the Hennepin County Attorney. Around the time she took office, Moriarty read Sweasy's MDHR charge. Moriarty did not think that Sweasy's allegations of sex discrimination "r[a]ng true," and

believed that the decision not to make her head of the Adult Prosecution Division was instead "about insubordination" in relation to the Chauvin complaint, which Moriarty had perceived as "very, very favorable to Chauvin."

Moriarty removed Sweasy from the CPU, took away her managerial and supervisory responsibilities, and reassigned her to work on complex economic crimes within the Special Litigation Division. Moriarty told Sweasy that she was making the reassignment because of Sweasy's "history and the people involved." Sweasy understood "history" to reference her MDHR charge and "the people involved" to refer to the people who had engaged in retaliatory conduct toward her, including Freeman.[2]

The Special Litigation Division was headed by another principal and managing attorney, and a senior attorney oversaw the Complex Economic Crimes Unit. Although Sweasy reported directly to Moriarty, she received work assignments from the senior attorney. Sweasy averred that, from February 6, 2023, through April 4, 2023, the senior attorney assigned Sweasy to "approximately three low-level cases." The three cases typically would have been "handled by line attorneys, not Principal Attorneys."[3] And although Sweasy reported directly to Moriarty, Moriarty had no contact with Sweasy about

[2] The county disputes Sweasy's characterization of the transfer decision, relying on Moriarty's testimony that she had decided to move the CPU into the Adult Prosecution Division and could not have Sweasy co-manage or report to the head of the Adult Prosecution Division because of the poor relationship between the two. Moriarty also testified that she envisioned creating a worker protection unit and that Sweasy, with her complex litigation background, could "take this unit and run with it." Sweasy avers that Moriarty never told her about the plans to establish this unit.

[3] The term "line attorney" refers to an entry-level assistant county attorney.

her work following the transfer for approximately three months. Moriarty conceded that there was "probably not" anyone else at the county attorney's office that she supervised and did not communicate with about their performance for that length of time. On April 4, 2023, believing that her "career was effectively over" and that she had "no choice but to leave," Sweasy submitted her resignation, effective May 3, 2023.

Before Sweasy's separation from the county, the defendants filed a motion to dismiss under Minnesota Rule of Civil Procedure 12.02(e), which the district court granted in part on April 18, 2023. The court dismissed in-part Sweasy's contract and fraudulent-inducement claims, to the extent they relied on certain theories no longer at issue on appeal; dismissed the tortious-interference claim; and dismissed the civil-conspiracy claim.[4] In August 2023, Sweasy amended her complaint, adding allegations relating to Moriarty's reassignment of Sweasy and Sweasy's eventual resignation. Then, on December 18, 2023, the district court granted summary judgment under Minnesota Rule of Civil Procedure 56.01 in favor of Freeman and the county on all of Sweasy's remaining claims.

On appeal, Sweasy challenges the district court's summary-judgment decision as to four claims: (1) breach of the express terms of the settlement agreement, against the county; (2) breach of the implied covenant of good faith and fair dealing, against the county and Freeman; (3) violation of the Minnesota whistleblower act, against the county; and (4) fraudulent inducement, against the county and Freeman.

[4] The district court dismissed all claims against Hough under Minnesota Rule of Civil Procedure 12.02(e), and Sweasy does not challenge the rule 12.02(e) rulings on appeal.

DECISION

We review a district court's grant of summary judgment de novo and will affirm "if no genuine issues of material fact exist and if the court accurately applied the law." *Hanson v. Dep't of Nat. Res*., 972 N.W.2d 362, 371-72 (Minn. 2022). In determining whether fact issues exist, we view the evidence in the light most favorable to the nonmoving party—in this case, Sweasy. *Id.* at 372. But the county and Freeman are "entitled to summary judgment as a matter of law [if] the record reflects a complete lack of proof on an essential element" of a claim. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). With these standards in mind, we turn to evaluating whether summary judgment was appropriate as to each of the four claims Sweasy raises on appeal.

I

Sweasy first challenges the summary-judgment dismissal of her claim against the county for breach of the express terms of the settlement agreement. "The elements of a breach of contract claim are (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to [her] right to demand performance by the defendant, and (3) breach of the contract by defendant." *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) (quotation omitted). "[A] jury determines both the liability for a breach of contract and the amount of damages to award for the breach, if any, assuming genuine issues of material fact exist with respect to both questions that warrant submission to a jury." *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 63 n.9 (Minn. 2012). But "[a] breach of contract claim fails as a matter of law

if the plaintiff cannot establish that . . . she has been damaged by the alleged breach." *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. App. 2004).

In the district court, Sweasy asserted several theories of breach. On appeal, she advances just one: that the county breached paragraph 1 of the settlement agreement when it "eliminated all agreed-upon 'Principal Attorney' responsibilities in 2023."[5] In relation to this theory, Sweasy asserts that (A) the settlement agreement required that she be assigned to a position in which she would perform certain types of duties, (B) there are genuine issues of material fact as to whether the county breached that requirement, and (C) she has presented sufficient evidence of damages caused by the county's breach. We address each argument in turn.

A

Sweasy's first argument requires us to interpret the settlement agreement. A settlement agreement is a contract, and we review its language de novo to determine the intent of the parties. *Curtis v. Altria Grp., Inc*., 813 N.W.2d 891, 898 (Minn. 2012); *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010). When the language of the agreement is clear and unambiguous, we enforce that language. *Dykes*, 781 N.W.2d at 582.

Paragraph 1 of the settlement agreement provides, in relevant part:

> Sweasy will be reclassified as a Principal Attorney, and will be entitled to the pay and responsibilities outlined in the County's

[5] The district court did not address this theory in ruling on Sweasy's claim for breach of the express terms of the settlement agreement, but the district court rejected Sweasy's interpretation of paragraph 1 in ruling on her claim for breach of the implied covenant of good faith and fair dealing. The district court also concluded that Sweasy could not prove damages in relation to other theories of breach. Because our review is de novo, we need not further discuss the district court's analysis of this claim.

> Job Class specification for that position. Sweasy's classification as a Principal Attorney shall continue beyond the end of 2022, subject to the civil service rules of Hennepin County. . . . Job duties of a Principal Attorney include:
>
> a. Plan, coordinate, direct and evaluate the work of attorneys and support staff in a division of the County Attorney's Office;
>
> b. Consult and advise on administrative and legal matters relating to the policies and practices of the office;
>
> c. Provide guidance and assistance to subordinates on administrative and legal problems;
>
> d. Direct the investigation and prosecution of assigned cases;
>
> e. Provide counsel and legal assistance to the various County departments and agencies;
>
> f. Participate in the selection, training and evaluation of professional, investigative and support staff;
>
> g. Prepare required reports;
>
> h. Maintain liaison with other public officials, the Bar and interested civic organizations and individuals.

Sweasy and the county both maintain that paragraph 1 of the settlement agreement is unambiguous, but they advance different interpretations of it. Sweasy asserts that paragraph 1 guaranteed her a position with defined responsibilities—the eight identified duties of a principal attorney. The county argues that the duties in the settlement agreement were illustrative and subject to change pursuant to the county's job class specification and

civil service rules.[6] And, at oral argument, the county took the position that it would not breach the contract even by assigning Sweasy to a position that included none of identified principal attorney duties. We conclude that the county's argument goes too far.

Paragraph 1 of the settlement agreement provides that Sweasy "*will be entitled to* the pay *and responsibilities* outlined in the County's Job Class Specification for that position." (Emphasis added.) The agreement then expressly delineates eight duties "include[d]" in the role of a principal attorney, which are the same in all material respects as those identified in the corresponding job class specification. A plain reading of this language reflects the parties' intent that Sweasy's classification as a principal attorney was not simply an agreement as to job title and pay—it "entitled" Sweasy to certain job responsibilities.

In arguing otherwise, the county emphasizes language in the job class specification that provides that "[t]he work assigned to a position allocated to this class may not include all of the functions . . . indicated nor does the class specification include all work that may be assigned or restrict the emphasis of the work assigned." But the fact that a principal attorney might not perform *all* of the principal attorney duties enumerated in the job class specification at all times, or that a principal attorney may also perform some unspecified

[6] The civil service rules state that the purpose of the rules is to "provide a system of human resources administration in Hennepin County pursuant to Minnesota Statutes [§§ 383B.26-.42 (1994)]." The rules require the county to develop a classification plan for all job positions and require it to rely on job class specifications in allocating positions to particular classes. The job class specifications "shall include the class title, a description of the duties and responsibilities of the work and a statement of qualifications (minimum requirements) a person shall possess to enable him/her to enter upon the duties of a position of the class with reasonable prospect of success."

duties, does not mean that the work assigned may include *none* of the specified duties. The settlement agreement reflects that understanding, in that it expressly states that the duties of a principal attorney "include" the eight listed. The supreme court has held that the meaning of "include," and whether it signifies an "enlargement or a limitation" of a list, depends on the context. *In re Welfare of H.B.*, 986 N.W.2d 158, 169 (Minn. 2022). So even if we consider the language that the county emphasizes in the job class specification as helpful context, that language indicates that the duties "include[d]" in the agreement are not exhaustive. The clear implication of paragraph 1 is that the parties intended Sweasy's responsibilities at any given time to include at least some, if not all, of the listed duties.

The county also directs us to the language in paragraph 1 that provides that "Sweasy's classification as a principal attorney shall continue beyond the end of 2022, *subject to the civil service rules of Hennepin County*." (Emphasis added.) A provision in the civil service rules, in turn, provides that the job class specifications "shall not be construed as" limiting "the power of any appointing authority to assign, direct and control the work of employees." In the county's view, the settlement agreement's reference to the applicability of the civil service rules after the year 2022 means that the agreement, at most, bound Freeman to assign Sweasy to duties consistent with those of a principal attorney and did not bind Moriarty in the same way. But another provision in the civil service rules cuts the other way. The rules contemplate that a job class still encompasses certain types of duties, stating that "[t]he use of a particular expression or illustration as to duties shall not be held to exclude others not mentioned *that are of a similar kind or quality*." (Emphasis added.)

The idea that Sweasy's principal attorney role would continue after 2022 to consist of duties at least "of a similar kind or quality" to those enumerated in the settlement agreement is reflected elsewhere in the language of the agreement. Paragraph 4 provides: "Sweasy acknowledges and understands that her assignments, *as long as they are consistent with the duties of a Principal Attorney*, may be subject to change at the direction of a new County Attorney." (Emphasis added.) As the county noted at oral argument, the continuing application of paragraph 4 is uncertain because of language in paragraph 8 stating that "[t]he provisions in Paragraphs 2 through 6, as well as the reporting relationship specified in paragraph 1, are not and cannot be binding on the next County Attorney." Still, the language chosen by the parties in paragraph 4 reflects the parties' intent that the settlement agreement would create an ongoing obligation on the part of the county relating to Sweasy's job duties as a principal attorney.

Most importantly, it is the language of the settlement agreement—not the job class specification or the civil service rules—that controls the county's obligations here. *Cf. Weiss v. City of St. Paul*, 300 N.W. 795, 797 (Minn. 1941) (noting that "[i]t is a well settled rule of construction that the expressed prevails over what might otherwise be implied"). The settlement agreement "entitle[d]" Sweasy to certain job "responsibilities" and the county's arguments do not persuade us that the county could, consistent with the settlement agreement, assign Sweasy to a role that included none of the enumerated duties. Considering the plain language of paragraph 1, in the context of the agreement as a whole, we conclude that the settlement agreement obligated the county to assign Sweasy to a position with duties consistent with the principal attorney duties identified in paragraph 1.

We therefore turn our attention to the issue of breach.

B

Sweasy asserts that there are genuine issues of material fact as to whether the county breached its obligations under paragraph 1 of the settlement agreement. "Fact issues exist when reasonable persons might draw different conclusions from the evidence presented." *Hanson*, 972 N.W.2d at 372 (quotation omitted). In arguing breach, Sweasy relies on her own testimony and testimony from the former head of the Special Litigation Division. In a declaration, Sweasy avered that, following her reassignment, she was "working on cases that were typically handled by line attorneys, not Principal Attorneys." And in her deposition, she testified that the transfer was "a complete stripping of anything resembling a principal attorney job." The former head of the Special Litigation Division testified that, at the time of Sweasy's transfer, the only open positions in that division were line attorney positions, and that, following the transfer, "she wasn't doing the jobs of a principal attorney or manager." And Moriarty conceded that, following the transfer, Sweasy had no supervisory responsibilities and did not assign work to others. The county identifies contrary evidence, including that Sweasy was still directing the investigation and prosecution of assigned cases and providing counsel to county departments. We are persuaded that "reasonable persons might draw different conclusions" from this evidence as to whether Sweasy's duties after the transfer were consistent with the duties of a principal attorney identified in the settlement agreement. *Id.* (quotation omitted). We therefore conclude that fact issues exist on the issue of breach, and we turn to the issue of damages.

C

Under established common-law principles, "[t]he measure of damages for breach of an employment contract is the amount of compensation which an employee would have received had the contract been carried out." *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 127 (Minn. App. 1992), *rev. denied* (Minn. Apr. 29, 1992). A plaintiff may recover compensatory damages in the form of "general" damages or "consequential" damages (also known as special damages). *DeRosier v. Util. Sys. of Am., Inc.*, 780 N.W.2d 1, 4-5 (Minn. App. 2010). General damages "naturally and necessarily result from the act complained of." *Id.* at 4 (quoting *Indep. Brewing Ass'n v. Burt*, 123 N.W. 932, 934 (Minn. 1909)). Consequential damages, in turn, are "the natural, but not the necessary, result of a breach," and they are recoverable only if "they are reasonably foreseeable to the parties at the time of breach." *Id.* at 4-5.

Sweasy claims compensatory damages in the form of lost income and diminished earning capacity that followed from the county's breach of the settlement agreement and Sweasy's subsequent separation from employment with the county.[7] Under a theory of constructive discharge, she maintains that her lost income and diminished earning capacity are general damages because they are the natural and necessary result of the county's breach, which forced her to resign. She alternatively argues that her lost income and diminished earning capacity constitute special damages because they are "a natural and

[7] Sweasy does not seek specific performance through reinstatement.

foreseeable result flowing from this type of breach." In support of her damages theories, Sweasy avers:

> Despite my decades of experience and success as a violent crime prosecutor, it was clear my career was effectively over by April 4, 2023. By this point, I had undergone years of retaliation, disrespect, embarrassment, and purposeful efforts by Hennepin County to make me so uncomfortable that I would feel no choice but to leave.

Sweasy also points to testimony from multiple other attorneys who worked in the county attorney's office that Sweasy's transfer forced her into a "miserable working condition" where she could not stay and maintain any professional self-respect. Sweasy's colleagues perceived that she was "being shunted off to the side" and "squeezed out." One colleague testified that she did not "know how anybody could assume that somebody could tolerate this for any length of time." And another, when asked whether the county was trying to make Sweasy resign said, "[T]here's no other way to interpret this."[8] Sweasy also points to testimony from two experts: a vocational expert, who opines that Sweasy "has sustained a diminution of occupational opportunity and earning capacity" following her

[8] In analyzing Sweasy's constructive-discharge arguments, the district court did not rely on some unspecified testimony of these colleagues, concluding it was inadmissible hearsay for the purpose of establishing that the county was "trying to get Sweasy to quit." But the court did not consider whether the testimony contained inadmissible hearsay for the purpose of establishing the foreseeability element of special contract damages. The district court will retain discretion on remand to make specific evidentiary rulings before or during trial, including whether the lay opinions of Sweasy's colleagues may be appropriately considered, as Sweasy argues on appeal. *See* Minn. R. Evid. 701. We are persuaded based on our review of the record that there is sufficient admissible evidence, consistent with the district court's evidentiary rulings, to create a genuine issue of material fact regarding contract damages.

separation from the county; and an economic expert, who estimated the present value of Sweasy's expected lost income and benefits.

This evidence, considered in the light most favorable to Sweasy, is sufficient to create a genuine issue of material fact as to consequential damages. That is, there are genuine issues of material fact as to whether Sweasy's resignation and the lost income and diminished earning capacity that followed are the "the natural . . . result[s] of [the] breach" and were "reasonably foreseeable to the parties at the time of the breach." *Id.*

We conclude that focusing on consequential damages is a better fit for this context than Sweasy's argument for general damages resulting from alleged constructive discharge. "[C]onstructive discharge is a doctrine that may be invoked by a plaintiff in some employment-related actions to prove that, even though the plaintiff resigned from his or her job, the defendant should be deemed to have made an adverse employment action." *Coursolle v. EMC Ins. Grp. Inc.*, 794 N.W.2d 652, 660 (Minn. App. 2011), *rev. denied* (Minn. Apr. 19, 2011). But an adverse employment action is not an element of a breach-of-contract claim. Rather, the relevant element is the breach (here, if proven, the county's violation of paragraph 1 of the settlement agreement). Thus, "[t]he measure of damages . . . is the amount of compensation which an employee would have received had the contract been carried out." *Brooks*, 481 N.W.2d at 127. Admittedly, an assessment of consequential damages resembles the constructive-discharge analysis in that the consequential-damages test asks whether the alleged harms are the natural result of the breach and were reasonably foreseeable to the parties at the time of the breach. *Compare DeRosier*, 780 N.W.2d at 4-5 (recognizing requirement that consequential damages were

foreseeable at time of breach), *with Henry v. Indep. Sch. Dist. No. 625*, 988 N.W.2d 868, 887 (Minn. 2023) (explaining that constructive discharge requires proof of employer intent, which may be accomplished by "demonstrating that resignation was a reasonably foreseeable consequence of the employer's deliberate actions"). But we decline to import theories of constructive-discharge into the breach-of-contract context just because they apply in other types of employment claims.

The county argues that Sweasy has not demonstrated recoverable contract damages because she "is unable to point to a case where a court awarded front-pay arising out of an alleged breach of contract . . . where the breach did not involve an actual termination of employment."[9] But the county does not provide any case to the contrary, nor does it offer any explanation why, under general principles governing contract damages, actual termination is a prerequisite to front pay as a form of consequential damages. Again, this is not a claim for employment discrimination, in which case termination (actual or constructive) could establish an adverse employment action. *See Henry*, 988 N.W.2d at 884 (explaining that constructive discharge may satisfy adverse-employment-action requirement of claim under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01-.50 (2022)); *see also, e.g.*, *Bersie v. Zycad Corp.*, 399 N.W.2d 141, 146 (Minn. App. 1987) (recognizing, in reversing judgment in favor of employer on sexual-harassment claim, that appellant, who resigned, could claim constructive discharge). So long as Sweasy establishes a breach of the settlement agreement, the damages evidence will be sufficient

[9] Front pay typically refers to "future damages . . . for lost compensation that occurs after the time of trial." *Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 406 (Minn. 2004).

if it reflects "the amount of compensation which [Sweasy] would have received had the contract been carried out." *Brooks*, 481 N.W.2d at 127. The supreme court has explained in the breach-of-employment-contract context that "[t]he common law principle that actual or compensatory damages may include future losses [(i.e., front pay)] is well established in Minnesota." *Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 407 (Minn. 2004). And any relevant guardrails to front-pay damages would apply. *See, e.g.*, *id.* at 408 (noting that "front pay awards are limited to the damages *caused* by the employer's breach" (emphasis added)); *Feges v. Perkins Rests., Inc.*, 483 N.W.2d. 701, 710 (Minn. 1992) (discussing mitigation, "feasibility of reinstatement," "prospects for future employment," certainty of income absent the breach, and "the length of time for which front-pay is sought").[10]

When we apply well-established contract-damages principles here, we conclude that Sweasy has presented sufficient evidence to create a genuine issue of material fact as to whether her asserted lost income and diminished earning capacity naturally resulted from the county's breach, if proven, and were reasonably foreseeable to the county at the time of any such breach. Those issues, as well as the extent of damages, if any, are for a jury to decide. *United Prairie Bank-Mountain Lake*, 813 N.W.2d at 63 n.9.

In sum, because we conclude that the settlement agreement required the county to assign Sweasy to a position with duties consistent with the identified principal attorney

[10] The county also argues that Sweasy forfeited a damages theory based on her separation from the county by failing to argue it to the district court. But Sweasy made the same arguments regarding contractual damages in her summary-judgment briefing in the district court that she advances on appeal.

duties in the settlement agreement and that Sweasy has demonstrated the existence of genuine issues of material fact as to breach and damages, we reverse the summary-judgment dismissal of Sweasy's claim for breach of paragraph 1 of the settlement agreement and remand to the district court for further proceedings on that claim.

II

Sweasy next challenges the summary-judgment dismissal of her claim against the county and Freeman for breach of the implied covenant of good faith and fair dealing. She argues that the district court erroneously limited the scope of such a claim to conduct by one party that unjustifiably hinders the other party's performance of a contract, and effectively urges this court to adopt a broader formulation of the claim. The county and Freeman respond that the district court correctly applied the existing standard to the claim.

The supreme court has held that, "[u]nder Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (citing Restatement (Second) of Contracts § 205 (1981)) (other citations omitted).[11] The court has explained that, although a plaintiff need not prove an express breach of contract, "the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the

[11] In two cases, we have assumed without deciding that the implied covenant also applies to require a party exercising a discretionary duty under a contract to do so in good faith. *See Cent. Specialties, Inc. v. Minn. Dep't of Transp.*, 5 N.W.3d 409, 417 (Minn. App. 2024), *rev. denied* (July 9, 2024); *Sterling Cap. Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998). This formulation of the implied covenant is not at issue here.

underlying contract." *Id.* at 503. In other words, "Minnesota does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing based on terms not included in the contract." *Metro. Transp. Network, Inc. v. Collaborative Student Transp. of Minn., LLC*, 6 N.W.3d 771, 782 (Minn. App. 2024), *rev. denied* (July 23, 2024).

Sweasy argues for a much broader application of the claim. In support of this argument, she relies on comment d to section 205 of the Restatement (Second) of Contracts, which provides that "[a] complete catalogue of types of bad faith is impossible" and reports that "judicial decisions" have recognized bad faith to include things like "evasion of the spirit of the bargain." We decline Sweasy's invitation to expand the implied-covenant claim based on comment d because "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *rev. denied* (Minn. Dec. 18, 1987).

Sweasy forfeited any argument that her claims survive summary judgment under the existing standard by failing to make that argument to the district court or in her principal brief. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court); *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (recognizing that raising issues for the first time in a reply brief is "not proper practice and is not to be permitted," though an appellate court may decide to consider the issues, especially if they were raised to district court (quotation omitted)). In her reply brief, Sweasy asserts, without further explanation, that "[t]he record shows how Respondents unjustifiably hindered the performance of the Agreement, and reversal on these grounds is

warranted." We decline to consider this argument because it is belatedly asserted, based on "mere assertion," and a prejudicial error is not obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971).

Accordingly, we affirm the summary-judgment dismissal of her claim for breach of the implied covenant of good faith and fair dealing.

III

Sweasy next challenges the summary-judgment dismissal of her claim under the Minnesota whistleblower act, arguing that the district court erred in determining that the claim (A) fails on the merits and (B) alternatively, is partially barred by vicarious official immunity. We address each argument in turn.

A

Sweasy argues that there are genuine issues of material fact that preclude summary judgment on her whistleblower claim. We begin with an overview of the whistleblower act and the standard that courts apply to evaluate whistleblower claims at summary judgment. We then analyze whether Sweasy has provided evidence sufficient to survive summary judgment.

Under the whistleblower act,

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation, of any federal or state law or rule adopted pursuant

> to law to an employer or to any governmental body or law enforcement official; [or]
>
> . . . .
>
> (3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

Minn. Stat. § 181.932, subd. 1 (2022). And "'[p]enalize' means conduct that might dissuade a reasonable employee from making or supporting a report." Minn. Stat. § 181.931, subd. 5 (2022).[12]

Minnesota courts have applied the *McDonnell Douglas* burden-shifting framework to claims under the whistleblower act at summary judgment. *See Hanson*, 972 N.W.2d at 372 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973));[13] *Moore v. City of New Brighton*, 932 N.W.2d 317, 323 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019). To establish a prima facie case under the whistleblower act, a plaintiff must produce evidence of (1) statutorily protected conduct, (2) an adverse employment action, and (3) a causal connection between the two. *See Hanson*, 972 N.W.2d at 374; *Moore*, 932 N.W.2d

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[12] The legislature amended the whistleblower act in 2023. *See* 2023 Minn. Laws ch. 53, art. 11, § 26, at 1290-91. The 2023 amendments, which took effect July 1, 2023, do not apply to Sweasy's claim, which is based on conduct in and before May 2023.

[13] In *Hanson*, the supreme court addressed an argument to replace the *McDonnell Douglas* framework in whistleblower claims with "a streamlined summary judgment standard" based on the pattern jury instructions for such a claim. 972 N.W.2d at 377. The supreme court, reasoning that the result would be the same under either standard, "decline[d] to reach the issue of whether we should abandon the *McDonnell Douglas* framework in whistleblower cases." *Id.* at 378. No party to this appeal argues that the *McDonnell Douglas* framework should not be applied to Sweasy's whistleblower claim.

at 323. If a prima facie case is established, the employer must articulate a legitimate, nonretaliatory reason for its actions, and, if it does so, the plaintiff must demonstrate that the asserted reason was a pretext for retaliation. *Hanson*, 972 N.W.2d at 373.

Beginning with the first prong of the prima facie case, we note that there is no dispute regarding the protected conduct. The only protected conduct that Sweasy asserts on appeal is her 2020 withdrawal from the Floyd matters, and the county assumes for purposes of the appeal that this was protected conduct. We therefore also assume without deciding that the 2020 withdrawal constituted protected conduct. *See Hanson*, 972 N.W.2d at 374 ("Because the DNR does not argue that Hanson's reporting was not protected conduct, we assume that her reporting is statutorily protected."). We turn our attention to the second prong of the prima facie case—whether Sweasy has demonstrated an adverse employment action.

In determining what constitutes an adverse employment action under the whistleblower act, we begin with the language of the statute. *See Hanson*, 972 N.W.2d at 374 (looking to statutory language in determining that discharge was an adverse employment action). The statute not only prohibits employers from "discharg[ing], disciplin[ing], threaten[ing], [and] otherwise discriminat[ing] against" an employee, it also provides that employers shall not "otherwise . . . penalize" an employee for protected conduct. Minn. Stat. § 181.932, subd. 1(3). And, although "penaliz[ing]" an employee for protected conduct was prohibited in early versions of the whistleblower act, the legislature added a statutory definition of the term "penalize" in a 2013 statutory amendment. *See* 2013 Minn. Laws ch. 83, §§ 1-3, at 469. "Penalize" is now defined as "conduct that might

dissuade a reasonable employee from making or supporting a report." Minn. Stat. § 181.931, subd. 5. This statutory definition supersedes our pre-2013 cases that articulated a more demanding standard for establishing an adverse employment action under the act. *See Lee v. Regents of Univ. of Minn.*, 672 N.W.2d 366, 374 (Minn. App. 2003) (noting that, "[t]o satisfy the adverse employment action element, the employee must establish the employer's conduct resulted in a 'material change in the terms or conditions of her employment'" (emphasis omitted)); *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841-42 (Minn. App. 2007) (same), *rev. denied* (Minn. Aug. 7, 2007). As we recognized in *Moore v. City of New Brighton*, the "operative terms" of the statutory definition of "penalize"—conduct that "might dissuade" a "reasonable employee"—"are plain and unambiguous, and they suggest an inclusive reach into a wide variety of unspecified employer behavior." 932 N.W.2d at 325.

Sweasy asserts adverse employment actions in the form of Freeman and others discouraging attorneys from applying to the CPU, interfering with case assignments to the CPU, and telling others that her new position in the CPU was not "real." She argues that, "[a]lthough not termination or demotion, a jury could reasonably conclude that the adverse conduct imposed on Sweasy during this period (under Freeman) would likely dissuade a reasonable employee from blowing the whistle." She also asserts that she suffered an adverse employment action under the act when Moriarty transferred her out of the CPU, did not talk to her after the transfer, removed her managing and supervisory responsibilities, and gave her three cases typically handled by a line attorney.

The county argues that Sweasy cannot demonstrate an adverse employment action because she has not presented sufficient evidence to prove that she was constructively discharged. As we explained in addressing Sweasy's breach-of-contract claim, constructive discharge allows a plaintiff who has voluntarily separated from employment to meet the adverse-employment-action requirement for some employment-related claims. *See Coursolle*, 794 N.W.2d at 660; *see also Henry*, 988 N.W.2d at 884-89 (defining the contours of the doctrine in the context of a discrimination claim under the Minnesota Human Rights Act). "Neither the supreme court nor this court has applied the constructive discharge doctrine to a whistleblower claim." *Coursolle*, 794 N.W.2d at 662. Here, given the broad statutory definition of penalize, as interpreted in our precedential decision in *Moore*, we conclude that Sweasy has met her prima facie burden to show an adverse employment action within the meaning of the whistleblower act. It is therefore unnecessary to resolve the issue of whether Sweasy can prove that she was constructively discharged.[14]

[14] The county also argues that Sweasy's "generalized claims regarding Freeman's alleged interference with staffing or discouraging applicants to the CPU were premised entirely upon inadmissible hearsay." But, while the district court ruled that some evidence relating to Sweasy's whistleblower claim was inadmissible for purposes of establishing constructive discharge, it also concluded that whether office leadership "discouraged staff from assigning cases to the CPU," was "a fact issue" based on admissible evidence. And it acknowledged admissible evidence that office leadership "gave senior attorneys the message that applying to the CPU would not be good for their career as they would not get promoted." Moreover, the district court's evidentiary rulings were not considered in the context of Sweasy's "penalize" theory to establish an adverse employment action. Ultimately, specific evidentiary rulings will fall within the district court's discretion before or during trial, including whether evidence might be admissible as nonhearsay under Minn. R. Evid. 801(d)(2) or lay opinion under Minn. R. Evid. 701, as Sweasy argues on appeal. We are persuaded based on our review of the record that there is sufficient admissible evidence, consistent with the district court's evidentiary rulings, to create a genuine issue

On the third, and final, prong of the prima facie case, a plaintiff may "demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley v. City of Otsego*, 623 N.W.2d 625, 632 (Minn. App. 2001), *rev. denied* (Minn. May 15, 2001). "A fact is proved by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case." *Id.* at 633 (emphasis omitted). For instance, "the employer's knowledge of the employee's protected activity along with close temporal proximity to the adverse action suffices to establish a causal connection." *Hanson*, 972 N.W.2d at 374.

Sweasy argues that she presented sufficient evidence to establish a causal connection between her 2020 withdrawal and the asserted adverse employment actions. With respect to the asserted adverse employment actions relating to the CPU, Sweasy relies on testimony regarding Freeman's ongoing hostility toward her and Mabley's testimony that Freeman never got over her withdrawal from the Floyd matters. With respect to the 2023 transfer to the Special Litigation Division, Sweasy relies on Moriarty's testimony that before the transfer occurred, Moriarty read the MDHR charge, which referenced the circumstances surrounding Sweasy's withdrawal from the Floyd matters. In describing her reaction to the MDHR charge, Moriarty testified that she thought the conduct at issue in the charge was "about insubordination" as a result of Sweasy's handling of the Floyd matters. We agree that this evidence, taken in the light most favorable to Sweasy, is

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of material fact as to whether Sweasy suffered an adverse employment action within the meaning of the whistleblower act.

sufficient to "justif[y] an inference of retaliatory motive," and therefore creates a genuine issue of material fact regarding causation. *Cokley*, 623 N.W.2d at 632.

Because Sweasy has demonstrated a prima facie case under the whistleblower act, we turn to examining the county's articulated reasons for the adverse employment actions and whether Sweasy has presented evidence sufficient to demonstrate pretext. The county asserts that Moriarty transferred Sweasy to the Complex Economic Crimes Unit in the Special Litigation Division after considering differences between Sweasy's and Moriarty's prosecution philosophies, Sweasy's relationships with others in the office, and Sweasy's skillset. The county also asserts that Moriarty intended to create a worker protection unit that Sweasy could lead.[15] Sweasy does not dispute that these are legitimate, nonretaliatory reasons but argues that she has presented sufficient evidence to demonstrate that the reasons were a pretext for retaliation.

Pretext may be shown through evidence that an employer's stated reason for an employment decision is untrue. *Hanson*, 972 N.W.2d at 373. Or it can be shown through evidence "that an improper reason motivated the . . . decision." *Id.* (quotation omitted); *see also McGrath v. TCF Bank Sav., FSB*, 509 N.W.2d 365, 366 (Minn. 1993) (explaining that "even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason more likely than not motivated the discharge decision" (quotation omitted)). Here, in addition to the circumstantial evidence supporting her prima

[15] The county does not assert that there are legitimate nonretaliatory reasons for the adverse employment actions alleged to have occurred under Freeman, leaving those aspects of Sweasy's prima facie case unrebutted at this juncture.

facie case, Sweasy points to evidence disputing Moriarty's assertion that she planned to create a worker protection unit that Sweasy could manage. In particular, she relies on a declaration in which she avers that Moriarty never told her of an intent to create this new unit. She also points to Moriarty's testimony about Sweasy's "toxic presence" in the county attorney's office. Viewing the record as a whole and in the light most favorable to Sweasy, we conclude that there is a genuine issue of material fact regarding pretext.

B

Sweasy argues that the district court erred in determining that the county was entitled to official immunity with respect to Moriarty's decision to transfer Sweasy. In *Burns v. State*, we held that when "an individual official is responsible for the acts" alleged to violate the whistleblower act, "official immunity may be available to protect the government from liability for that conduct." 570 N.W.2d 17, 20 (Minn. App. 1997); *see also State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994) (holding that official immunity may be available to preclude claims under the Minnesota Human Rights Act). But a knowing violation of the whistleblower act "removes the protection of official immunity" because it demonstrates malice. *Burns*, 570 N.W.2d at 20; *see also Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998) ("Official immunity applies when the official's conduct involves the exercise of judgment or discretion, but malicious conduct is not immunized."); *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 465 (Minn. 2014) (explaining that malice is "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right"). Here, the county does not dispute that Moriarty was aware of her obligation not to retaliate.

Thus, because there is a fact issue as to the merits of the whistleblower claim, there is also a fact issue as to official immunity. *See Burns*, 570 N.W.2d at 18 (affirming denial of summary judgment on ground of immunity because there was a genuine issue of material fact as to whistleblower liability).

Because we conclude that Sweasy has demonstrated the existence of genuine issues of material fact in relation to her whistleblower claim and whether the county is entitled to official immunity, we reverse the summary-judgment dismissal of the whistleblower claim and remand to the district court for further proceedings on that claim.

IV

Sweasy last challenges the summary-judgment dismissal of her claim for fraudulent inducement, arguing that the district court erred by determining that the claim fails on the merits.[16] A claim for fraudulent inducement requires proof of

> (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance.

U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 373 (Minn. 2011). Fraud may be established by "concealment of the truth" in certain circumstances, including where "a party *conceals* a fact material to the transaction, and peculiarly within his own

[16] Sweasy also argues that the district court erred by determining that the claim is barred by statutory and official immunity. Because our consideration of the claim on the merits is dispositive, we do not reach those arguments.

knowledge, knowing that the other party acts on the presumption that no such fact exists." *Id.* (quoting *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 650 (Minn. 1976)).

Sweasy's theory of fraudulent inducement is that, in negotiating the settlement agreement, she understood that she would be the only managing attorney reclassified as a principal attorney, that the county and Freeman were aware of her understanding, and that the county and Freeman purposefully withheld their then-present intent to reclassify other managing attorneys. The county and Freeman argue that this theory fails for a number of reasons. We address their argument that Sweasy could not have reasonably relied on the alleged misrepresentations, and because our analysis of that argument is dispositive, we do not reach the remaining arguments.[17]

"To prevail on a claim of fraudulent misrepresentation, the complaining party must set forth evidence demonstrating both actual and reasonable reliance." *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320-21 (Minn. 2007). Here, Sweasy's own testimony defeats her assertion that she reasonably relied on the alleged omission in entering into the settlement agreement. Sweasy testified that she did not attempt to negotiate for exclusivity with respect to her reclassification as principal attorney "[b]ecause the other side wouldn't agree to it." Because she knew that the county would not agree to exclusivity, Sweasy could not have reasonably relied on the alleged omissions. *See id.* at 321 (explaining that "a party can reasonably rely on a representation unless the falsity of

[17] Although this was not the basis on which the district court dismissed the fraudulent-inducement claim, "summary judgment should be affirmed if it can be sustained on any ground." *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *rev. denied* (Minn. Feb. 13, 1996).

the representation is known or obvious to the listener"). And because she cannot prove reasonable reliance, we affirm the summary-judgment dismissal of Sweasy's fraudulent-inducement claim. *See Lubbers*, 539 N.W.2d at 401 (stating that a defendant is entitled to summary judgment when there is a complete lack of proof on an element of a plaintiff's claim).

* * *

In sum, we conclude that there are genuine issues of material fact that preclude summary judgment on Sweasy's claims against the county for breach of paragraph 1 of the settlement agreement and for violation of the whistleblower act. We therefore reverse the dismissal of those claims and remand for further proceedings not inconsistent with this decision. We affirm the district court's grant of summary judgment in all other respects.

Affirmed in part, reversed in part, and remanded.