JARDINE LOGAN & O'BRIEN P.L.L.P.
ATTORNEYS AT LAW

651.290.6500
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

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Issues in Employment Law: Performance Improvement Plans in Cases of Discrimination

By: Nolan Woods

Introduction

A common and necessary element to all workplace discrimination suits is the adverse employment action giving rise to the claims of discrimination or reprisal. In many such cases, the adverse employment action is termination, which is a clear and unambiguous adverse action. However, often the conduct of the employer is described as a collection of acts or continuum of allegedly discriminatory conduct that employees describe as creating a "hostile work environment" and drives an employee to resign from their position or feel that they have been "pushed out."

The Minnesota Supreme Court took up one such case recently, *Henry v. Indep. Sch. Dist. #625*, 988 N.W.2d 868 (Minn. 2023), and analyzed how placing an employee on a Performance Improvement Plan (PIP) may be part of a pattern of conduct sufficient to support employment claims such as being subjected to a hostile work environment or being constructively discharged.

Factual Background

Barbara Henry was employed as a network technician with Independent School District #625 (Saint Paul Public Schools) from 1997 to 2017. She was promoted to Network Technician II in 2007 and received strong performance reviews for most of her career.

In 2014, the district hired Idrissa Davis as the Deputy Chief of Technology Services, who later implemented changes in the department. In 2016, Henry received her first "below-standards" performance review under new management, citing deficiencies such as failing to meet deadlines, not being visible during work hours, speaking in an "agitated voice" to a supervisor, and not using district vehicles as required. Following this, she was placed on a Performance Improvement Plan (PIP). The PIP required Henry to improve in areas including managing multiple tasks efficiently, meeting all deadlines at 100% completion, proactively identifying issues and showing initiative in solving those issues, remaining visible throughout the workday and keeping the manager in the loop on her whereabouts, attending all scheduled meetings, being able to troubleshoot wireless or phone issues remotely when possible, requesting additional trainings to more efficiently perform job duties, and being available to train team members when necessary.

Henry again received a poor review in April 2017 after five months on the PIP, with the review citing performance deficiencies including gaps in knowledge, lack of follow-up on requests, missed deadlines, issues with work accountability and tardiness, continued failure to use district vehicles, and failure to seek further development and training opportunities. Subsequently, her supervisor recommended termination. Henry was made aware of the pending decision to terminate and afforded her an opportunity to present a statement in her own defense directly to her supervisor with a union representative present. Before a final decision was made, Henry consulted with her union steward and retired at age 57, believing she was being pushed out due to her age.

Procedural Posture

The district court granted summary judgment to the School District dismissing Henry's claims on the grounds that Henry resigned voluntarily and did not avail herself to the school's anti-discrimination policies and procedures.

The Court of Appeals reversed the summary judgment regarding the claim of disparate treatment, finding that a genuine dispute of material fact existed over whether Henry was constructively discharged. However, the Court of Appeals affirmed the dismissal of the hostile work environment claim, stating the alleged mistreatment was not severe or pervasive enough to constitute undue harassment.

Minnesota Supreme Court Decision

Whether a PIP Can Create a Hostile Work Environment

The first step in the Supreme Court's analysis was to review the application of the existing hostile work environment standard, previously only

addressed in the context of sexual harassment/discrimination claims rather than age-based claims. A hostile work environment claim requires the plaintiff to show, "(1) they are a member of a group that has protected status under the Human Rights Act; (2) they were subject to unwelcome harassment; (3) the harassment was based on their membership in a protected group; and (4) the harassment affected a term, condition, or privilege of their employment." *Henry v. Indep. Sch. Dist. #625*, 988 N.W.2d 868, 881 (Minn. 2023) (citing *Frieler*, 751 N.W.2d at 571 n.11). The alleged conduct must also be so severe or pervasive as to "alter the conditions of employment and create an abusive working environment." *Id.* (citing *Kenneh v. Homeward Bound*, 944 N.W.2d 222, 230 (Minn. 2020)). The harassment must be more than minor, the environment must be both objectively and subjectively offensive such that a reasonable person would also find the environment hostile and abusive, and the victim must have similarly perceived it so. *Id.*

The court went on to explain several factors that can indicate employer conduct, which when viewed in light of the totality of circumstances, rises to the level of creating such a hostile and abusive environment. The frequency of the conduct, the severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance are all factors to consider, especially when contrasted with a mere offensive utterance. *Id.* at 882 (citing *Kenneh* at 231). In Henry's case, the Supreme Court explained, there was no such evidence of verbal or physical harassment sufficient for a reasonable juror to conclude that Henry had been subjected to a hostile work environment. In short, being placed on a PIP alone was not sufficient to constitute a hostile work environment.

Whether a PIP Can Support a Disparate Treatment Claim

While being placed on the PIP did not constitute conduct by the employer creating a hostile work environment such that would support a discrimination claim, the Supreme Court further explained that placing Henry on a PIP may be relevant to an analysis of whether the employee had been constructively discharged, an adverse employment action which could support a claim of discrimination by disparate treatment. The existence of an adverse employment action is essential to discrimination claims in Minnesota law, as discrimination claims in Minnesota brought under circumstantial evidence of discrimination are generally analyzed under the *McDonnel Douglas* framework, named after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

"There are three steps in the *McDonnell Douglas* burden-shifting framework: first, the plaintiff must establish a prima facie case of discrimination; second, the employer must articulate a legitimate, nondiscriminatory reason for its conduct; and third, the plaintiff must prove that the reason offered by the defendant is merely a pretext for discrimination." *Henry* at 883 (citing *Hanson v. Dep't of Nat. Res.*, 972 N.W.2d 362, 363 (Minn. 2022)). To make a prima facie case of discrimination, "a plaintiff is generally required to show that: (1) she belongs to a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) circumstances exist that give rise to an inference of discrimination." *Id.*

In *Henry*, the only element at issue for making a prima facie case on the discrimination by disparate treatment claim was whether Henry had suffered an adverse employment action. Constructive discharge is a form of adverse employment action in which, "an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Id.* (citing *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004)). The Minnesota Supreme Court has described two factors that inform whether circumstances or conduct by the employer can amount to constructive discharge, including, "(1) objectively intolerable working conditions that are (2) created by the employer with the intention of forcing the employee to quit." *Id.* (citing *Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 32 (Minn. 2002)).

The Minnesota Supreme Court takes the opportunity in this case to discuss in detail the application of those standards in a disparate treatment claim. The court clarifies that objectively intolerable working conditions or conditions intended to force an employee to quit in the context of a disparate treatment claim do not require that the employee has been harassed, as in a hostile work environment claim, and therefore the types of conduct that can support a constructive discharge element are different. The court explains:

> The requisite objectively intolerable conditions for a constructive discharge based on disparate treatment can occur "[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns." *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002). In other words, a disparate-treatment-based constructive discharge can occur where, due to the employer's illegal discrimination in the form of unfavorable treatment based on the employee's protected status, "the handwriting [is] on the wall and the axe was about to fall." *Id.* (citation omitted) (internal quotation marks omitted). In such

> circumstances, an employee facing disparate treatment based on her protected status "would not be acting unreasonably if [she] decided that to remain with [her] employer would necessarily be inconsistent with even a minimal sense of self-respect, and therefore intolerable." *Hunt v. City of Markham*, 219 F.3d 649, 655 (7th Cir. 2000).

Henry v. Indep. Sch. Dist. #625, 988 N.W.2d 868, 886-887 (Minn. 2023).

Proving the intent of the employer can be accomplished in two ways. First, the plaintiff can show the employer deliberately created intolerable working conditions with the intent of forcing the employee to quit, or by showing that resignation was a reasonably foreseeable consequence of the employer's deliberate actions. *Id.* at 887. However, the court further explains that there is an objective component to this analysis, and that a reasonable person must be able to agree that the employer's discriminatingly motivated actions and the associated working conditions had become unbearable. *Id.* at 888.

> Ultimately, the court decided several key facts could lead a jury to believe that Henry had been constructively discharged:
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> Specifically, School District management (1) initiated three performance evaluations of Henry in less than a year, even though a performance evaluation had not been completed for approximately 2 years; (2) exaggerated Henry's trivial performance issues and used the exaggerated issues to support disciplinary action; (3) placed Henry on an unachievable PIP intended to cause her to resign or be terminated; (4) issued a written letter threatening to terminate Henry if she did not accomplish the goals set out in the PIP; (5) reprimanded Henry for conduct more harshly than other employees; (6) denied Henry the opportunity to attend a training session; (7) made comments that the problems within the department were because people "are too old" and permitted Davis to create an environment where employees were reluctant to report discriminatory conduct for fear of retaliation; and (8) made comments saying that longterm [sic] employees near retirement should "consider retirement and travel like his parents."

Henry v. Indep. Sch. Dist. #625, 988 N.W.2d 868, 889 (Minn. 2023).

> Finally, the court clarified the impact of a PIP on the constructive discharge analysis:
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> To be clear, the act of placing an employee on a PIP alone does *not* establish de facto grounds for a constructive discharge claim. As stated in a memorandum of agreement between the School District and Henry's union, "individual improvement plans are an appropriate method through which to identify job-related performance areas of concerns and provide an opportunity for employees to improve performance." We emphasize that the placement of an employee on a PIP does not, by itself, constitute an adverse employment action, particularly when the PIP is "reasonable" and/or "minimally onerous."

Henry v. Indep. Sch. Dist. #625, 988 N.W.2d 868, 890 (Minn. 2023) (citing Bernard v. St. Jude Med. Ctr. S.C., Inc., 398 F. Supp. 3d 439, 461-62 (D. Minn. 2019)); Payan v. UPS, 905 F.3d 1162, 1173 n.3 (10th Cir. 2018).

Key Takeaways

The *Henry* case is not a radical shift in precedent or in judicial approach to workplace discrimination claims but does provide very useful insight to the multiple moving parts of an MHRA claim, and especially on how Performance Improvement Plans impact the legal analysis of such claims. As an employer, using PIPs can be an important safeguard against claims of disparate treatment, but only if they are truly used uniformly and fairly within the business. Employers should be careful when drafting a PIP to only identify meaningful issues in employee performance and to provide achievable goals to rectify deficient work. Using a PIP in anticipation of impending termination and score-keeping minor infractions may end up creating more risk than it avoids.

Where does the line of Dykhoff decisions stand in 2025.

By Haven Wojciak

Dykhoff decisions are one of the most important lines of caselaw governing Minnesota Worker's compensation, having found: "To satisfy the 'arising out of' requirement of Minn. Stat. § 176.021, subd. 1 (2012), the employee must prove that there is a causal connection between the employee's employment and the injury for which compensation is sought."[1] However, over the past 12 years, there has been a consistent back and forth tug in the courts to define exactly what "arising out of" means. Recent updates in the law bring us closer to a standard, but continue to walk a fine line between an endlessly no fault system, and one where the injury must arise out of the actual course and scope of employment.

Most recently, in *Olson v. Total Specialty Contracting*, the court examined *Dykhoff* in holding that the employee sustained a compensable injury when he inexplicably fell before work hours on a flat surface, outside the construction gate of the work premises. The Court noted that the employee testified that he fell on some leaves, and concluded that his injury fell under the ingress/egress exception.[2] Moreover, the court found that the route to the employee's jobsite was very specific and directed by his work, and that by controlling the route of ingress and egress, the property outside the work premises was under the control of the employer for the purposes of workers' compensation. Here, the Court continued to roll back the definition of arising out of work under *Dykhoff*, in that even if the injury occurs outside the work premises, if the employer has directed the employee to take that specific route to work, the injury would be seen as "arising out of" the employment.

The Workers Compensation Court of Appeals also recently looked at the "arising out of" and "in the course of" requirements in *Espinoza v. Direct Home Health Care*.[3] Here, the court did affirm that the employee must have been subject to an increased risk of injury as a result of the employment, noting that this prong is satisfied when the employee's injury results from a risk occasioned by the employment, even if this is something as simple as walking across the street, if doing so can be considered a necessary component of one's job. The court went on to find that "in the course of" can be satisfied if the employee was doing the activities described above during their regular working hours. While the court findings here appear to be in line with what can be expected, the unique situation of this case, as a home health aide employed for the care of his mother, lent pause to just how far such a statute could extend.

Tomah v. Good Samaritan Society, however, helps to put a firmer barrier on defining activities "arising out of" one's employment.[4] Here, the court affirmed the holding in *Dykhoff* noting: "For an injury sustained on an employer's premises to arise out of employment, the employee must have faced a hazard that originated on the premises as part of the working environment, such as an external hazard, a special hazard, an unsafe condition, or a neutral condition with circumstances originating on the premises as part of the working environment that increased the employee's risk of injury, in order to have the requisite causal connection between the injury and employment."[5] In *Tomah*, the injured party did no more than stand up from a seated position. There was no twisting or turning, or any other extenuating circumstance that the court could point to in order to make a finding that the injury arose out of the employee's work. As such, the court found that such an injury, even though it occurred on a work site and during working hours, did not meet the *Dykhoff* criteria, and denied the claim.

The cases of *Tomah* and *Olson* appear to narrow the middle ground under the *Dykhoff* line of cases, between simply rising up from a chair versus slipping on wet leaves as entering the work site. However, ultimately the issue of arising out of is very fact specific and must be assessed based upon the unique circumstances of each case.

[1] Dykhoff v. Xcel Energy, 840 N.W.2d 821 (Minn. 2013)

[2] 2023 MN WRK. COMP. LEXIS 47, 2023 MN WRK. COMP. LEXIS 47

[3] 2022 MN WRK. COMP. LEXIS 50, 2022 MN WRK. COMP. LEXIS 50

[4] 2022 MN WRK. COMP. LEXIS 18, *7, 2022 MN WRK. COMP. LEXIS 18

[5] Dykhoff, 840 N.W.2d at 826-27, 73 W.C.D. at 871-72; see also Roller-Dick, 916 N.W.2d at 377, 78 W.C.D. at 487-88.

Congratulations

In *Aden v. City of Eagan, et al.*, 128 F.4th 952 (8th Cir. 2025), **Vicki Hruby** and **Joe Flynn** obtained dismissal on behalf of the City of Eagan and SWAT officers who responded to a standoff with police in July 2019. During the course of the standoff, less lethal munitions and flashbangs were used to take the armed subject into custody. However, while executing the tactical plan, the subject reached for and picked up a loaded firearm. As a result, multiple officers responded with deadly force. The Eighth Circuit, reversing the District Court, found both the use of less lethal munitions and flashbangs in a tactical arrest plan and the use of deadly force were objectively reasonable and did not violate Aden's constitutional rights. Accordingly, all claims against the officers and the City of Eagan were dismissed with prejudice.

In *Duenes v. Minnesota Prairie Alliance, et al.*, 2025 U.S. Dist. LEXIS 44500 (D. Minn. Mar. 12, 2025), **Vicki Hruby** obtained dismissal of all claims against a Steele County deputy, who placed a minor child in emergency protective care during a criminal sexual conduct investigation. The Court found the plaintiff's due process claims were barred by the *Rooker-Feldman* doctrine as the plaintiff's claims arise from the state court decision to transfer custody of the minor child to his mother and, therefore, could not be brought in federal court. As a result, the Court dismissed the Complaint in its entirety and with prejudice.

About the Authors

Nolan A. Woods
Associate

nwoods@jlolaw.com
651-290-6504

Nolan is an Associate at Jardine, Logan & O'Brien, P.L.L.P. and earned a J.D. from Mitchell Hamline School of Law. His practice is primarily focused on Workers' Compensation and Civil Litigation.

D. Haven Wojciak
Associate

dwojciak@jlolaw.com
651-290-6588

Haven is an Associate at Jardine, Logan & O'Brien, P.L.L.P. and earned a J.D. at Rutgers Law School. His practice is primarily focused on Workers' Compensation and Civil Litigation.

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Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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