

NO. A10-1558

State of Minnesota
In Court of Appeals

KIM HANSEN,

Appellant,

v.

ROBERT HALF INTERNATIONAL, INC.,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

- I. Did the trial court err when it found Respondent had no right of reinstatement under the Minnesota Parenting Leave Act (MPLA) because Appellant did not request such a leave?**

The court found that Appellant applied for leave under the FMLA and not the MPLA.

Apposite Authorities

Minn. Stat. § 181.941, subd. 1.

- II. Did the trial court err in determining that extending the length of the leave does not extend the right to reinstatement upon expiration of the leave?**

The court held that extending the leave does not extend the right to reinstatement upon return from leave.

Apposite Authorities

Minn. Stat. § 181.942; Hearst v. Progressive Foam Techs, Inc., 647 F.Supp.2d 1071 (E.D. Ar. 2009).

- III. Did the trial court error in finding as a matter of law that Respondent had conducted a legitimate reduction in force?**

The court found Appellant had no reinstatement right as her job had been eliminated through a reduction in force.

Apposite Authorities

Minn. Stat. § 181.942; Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 324 (Minn. 1995); Roland v. Franklin Career Services, LLC, 727 F.Supp.2d 1188, 1205-06 (D. Kan. 2003).

IV. Did the trial court err in dismissing Appellant's MPLA retaliation claim?

The court concluded the claim had not been plead, and would have been dismissed in any event.

Apposite Authorities

Minn. Stat. § 181.941, subd. 3; Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983).

V. Did the trial court err in refusing to grant Appellant's motion for partial summary judgment?

The court determined the other positions in the company were not comparable, as a matter of law, and so Appellant had no right to have jobs.

Apposite Authorities

Minn. R. Civ. Pro. 6.03; Minn. Stat. § 181.942.

VI. Did the trial court err in dismissing Appellant's sex (pregnancy) discrimination claim?

The court concluded that Appellant was terminated as part of a reduction in force, and dismissed the claim.

Apposite Authorities

Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 324 (Minn. 1995); Roland v. Franklin Career Services, LLC, 727 F.Supp.2d 1188, 1205-06 (D. Kan. 2003)

STATEMENT OF THE CASE

Appellant, Kim Hansen appeals from the July 6, 2010 Order and Judgment of District Court Judge Denise D. Reilly, Hennepin County, granting summary judgment in favor of Respondent Robert Half International, Inc. After termination of her employment, Appellant Hansen brought suit against Respondent. She had been an employee of Respondent working as a Legal Recruiter. She became pregnant, and applied for leave on Robert Half's forms. In late August of 2008, she went on leave. That leave was ultimately extended to December 1, 2008, in writing. Appellant returned to work on December 1st, and then was fired on December 2nd. Appellant brought claims alleging sex (pregnancy) discrimination in violation of the Minnesota Human Rights Act, and interference and retaliation claims under the Minnesota Parenting Leave Act.

Respondent moved for summary judgment on all counts. In response, Appellant moved for partial summary judgment in her favor. Appellant claimed that she had a statutory right of reinstatement into the same or substantially similar position, and that Respondent's failure to reinstate her in such position constitutes a per se violation of the MPLA. The Court granted Respondent's motion on all counts, and denied Appellant's Motion for Partial Summary Judgment. This appeal followed.

STATEMENT OF FACTS

Robert Half Legal maintains offices in both the United States and Canada. The Minneapolis office is within the Central Zone.

Appellant Hansen began her employment with Robert Half in 2004. She initially worked for the Office Team division of Robert Half. In that position she was involved in

the recruitment and placement of temporary office employees. In March 2006 she was transferred to Robert Half Legal. Marilyn Bird is the District Director for Robert Half Legal Central Zone. At some of the times relevant Jackie Moes was the Regional Manager, and all times relevant Amber Hennen was the Branch Manager of the Minneapolis office for Robert Half Legal. Appellant became pregnant and in August of 2008 applied for leave. Robert Half has a leave of absence Personnel Action Form (PAF). (AA-158-59.) That form identifies the leave types, which include medical, maternity, Family Medical Leave Act (FMLA), workers' compensation, personal, and military. The box for maternity leave was checked. The box for FMLA leave was not checked, nor was the box for personal leave. The same form also identifies documents required for the various types of leave. Documents relative to medical/maternity leave were identified. None of the boxes under the FMLA category were identified. Marilyn Bird signed this leave request authorization on September 5, 2008. (AA-158.) Due to medical complications the leave needed to be extended. Another PAF form was filled out which showed an anticipated return date of December 1, 2008. The document identified the extension as "Extend Existing Leave" and identified the leave type as maternity, not FMLA. (AA-159.) On October 29, 2008, Bird expressly approved the extension of this same maternity leave to December 1, 2008. (AA-160.)

Hansen returned to work on December 1, 2008, consistent with Robert Half Legal's extension of her leave. She was then terminated at noon on December 2, 2008. Respondent contends that the termination decision was made by Bird and executed by Hennen. Appellant presented evidence that at the time she was terminated Appellant

asked if there were any other positions available for her, and was told that there were not. Respondent contends that her position was eliminated through a reduction in force (RIF). Appellant however presented evidence that shortly before December 1, 2008, other employees were transferred from permanent placement to the temporary placement site of Robert Half Legal. Appellant further presented evidence that shortly before and shortly after her termination Robert Half Legal hired other employees both in the temporary and permanent placement sides of Robert Half Legal.

Further, Appellant presented evidence that while she was on leave, another employee was hired to fill her position. The day Appellant returned from leave, this other employee was transferred from the permanent placement position to the temporary placement position. That is, within Robert Half Legal Minneapolis, certain employees were charged with recruiting secretaries, paralegals and lawyers to be placed into permanent positions and others focus their recruiting duties on temporary placements. All such employees are under the same Clark/Bird/Moes/Hennen supervisory chain. Appellant's position had been filled while she was on leave and this same individual was then transferred to a comparable position the day Appellant returned (and the day before she was fired). If she had not taken leave, none of this would have occurred, and therefore Appellant was entitled to her current position or the comparable position in temporary placement. The court considered the facts around this and concluded, as a matter of law, that the other position was not comparable.

Appellant then brought suit, by Amended Complaint (AA-149).

Count I alleged violations of the Minnesota Human Rights Act (MHRA). It alleges that Appellant was demoted, reduced in pay, returned to a dissimilar position, and terminated because of her sex (pregnancy). (AA-154) (Paragraph 29). Count II alleged violations of the Minnesota Parenting Leave Act, Minn. Stat. § 181.941 (MPLA). On this count Appellant alleged that she was returned to work for one day, allowed to perform no duties, and then terminated under the pretext that her position had been eliminated. (AA-155) (Paragraph 36).

Respondent then moved for summary judgment. Respondent contended that Appellant did not have reinstatement rights under the MPLA. Respondent argued that Appellant's leave had been under the FMLA not the MPLA. Respondent further argued that, while her leave may have been extended to December 1st, such extension of the leave did not extend her reinstatement rights. Respondent further argued that Appellant's position had been eliminated through a legitimate reduction in force. The Court found all of the facts as Respondent alleged them to be, adopted all of Respondent's arguments, and dismissed all claims.

Appellant had moved for summary judgment on her own behalf under Minn. R. Civ. P. 56.03 on one aspect of the Amended Complaint. Specifically, Appellant alleged that the right of reinstatement is mandated by statute, that Respondent had an obligation to reinstate her in her previous position or a comparable position. The Court determined that Appellant had never applied for leave under the MPLA but found that she had instead applied only under the FMLA. The Court further held that even if the leave had been extended to December 1, 2008, the right to actually return to work on December 1,

2008, was not extended. She had the right to stay away. She just did not have the right to come back. Appellant's motion was denied.

With respect to Appellant's sex discrimination claim, the Court determined that Appellant had not presented a *prima facie* case. In particular, the Court instead found that Respondent had engaged in a legitimate RIF, that Appellant had been terminated due to that RIF, and that such was a legitimate, non-discriminatory reason for her termination. The Court dismissed that count as well. This appeal follows.

SUMMARY OF THE ARGUMENT

As to the MPLA claims, there are two aspects to the Appellant's claims. Appellant contends that she had a right to reinstatement to her position, or a comparable position, upon her return from leave. The refusal to reinstate her constitutes interference with her MPLA rights. Further, Appellant contends that the termination of her employment immediately upon her return from leave constitutes retaliation under the MPLA. Appellant contends that both claims were pled, and the Court made inappropriate adverse Findings of Fact, and erroneous Conclusions of Law in dismissing both claims. The Appellant contends that the Court should have granted summary judgment in favor of Appellant as to her interference (reinstatement) claim.

The right to reinstatement is a statutory right. Minn. Stat. § 181.941 provides that "an employer must grant an unpaid leave of absence to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child." That same provision further, and unambiguously, provides that the length of the leave shall be determined by the employee and may not exceed six weeks – "unless agreed to by the

employer.” Further, Minn. Stat. § 181.942, subd. 1, provides that any employee “returning from a leave of absence under § 181.941 is entitled to return to employment in the employee’s former position or in a position of comparable duties, number of hours, and pay.” Appellant’s position is that the record demonstrates clearly in this case that her employer expressly agreed to extend the leave to December 1, 2008. Accordingly, Appellant was entitled to reinstatement in her former position, or one comparable to it.

The Court decided that Appellant was not entitled to reinstatement. First, the Court determined that Appellant had requested leave under the FMLA, not under the MPLA. We contend that this was an erroneous Finding of Fact. Appellant became pregnant and requested leave. Leave was granted on forms prepared by Respondent, filled out by Respondent, and signed by Respondent. These forms provided a description of the various leaves available. One type of leave was medical/maternity, and one type of leave was FMLA. In *each and every occasion*, Respondent checked the box for maternity leave, not for FMLA leave. The Court, however, found that the documentation confirmed that Appellant received leave under the FMLA. At a minimum, this was an erroneous Finding of Fact. Appellant contends that there was no issue as to this fact. Every document referenced maternity leave, not FMLA leave. Accordingly, the Court should have found that Appellant requested maternity leave pursuant to the MPLA.

The Court further determined that Appellant had no reinstatement rights because MPLA leave is limited to six weeks. In this the Court committed a clear error of law. The statute expressly provides that the leave may exceed six weeks if “agreed to by the employer.” In this case the undisputed facts showed that Respondent extended the

existing leave, in writing, to December 1, 2008. Appellant accordingly contends that the Court should have concluded that Appellant's maternity leave had been extended to December 1, 2008.

The Court further concluded that even if Appellant's leave had been extended to December 1, 2008, her right of reinstatement was not extended. Appellant contends that, as a matter of law and as a matter of statutory construction, if the leave has been extended to December 1, 2008, then the right to return to work at the end of that leave has also been extended. Accordingly Appellant contends that she had a statutory right of reinstatement into her former position or one comparable to it. Appellant contends that the court erred in considering the disputed facts and concluding as a matter of law that the position of recruiting and placing temporary positions is not comparable to the job of recruiting and placing permanent positions.

Finally, the Court concluded that even if there was a right of reinstatement the Appellant's former position was eliminated through legitimate reduction in force. In this the Court made adverse Findings of Fact in the face of disputed facts. Appellant contends that there was not a legitimate RIF. While Respondent was reducing staff on the permanent-placement side ("perm") of Robert Half Legal, it was adding staff in the temporary-placement side ("temp") of Robert Half Legal. Indeed, an employee had been hired during Appellant's leave into Appellant's position in Robert Half Legal Permanent. The day Appellant returned to work, this employee was transferred to the temp side of Robert Half Legal. Also during Appellant's leave other employees were transferred from permanent to temporary. There had not been a RIF, just a reshuffling of employees. The

Court made a determination of this question of fact and concluded, as a matter of law, that Respondent had engaged in a legitimate RIF. This was error.

Appellant also contends that the Court inappropriately dismissed Appellant's MPLA retaliation claim. MPLA expressly prohibits retaliation against an employee for requesting or obtaining a leave. Minn. Stat. § 181.941, subd. 3. In this case Appellant was terminated twelve working hours after she returned from her leave. As such, Appellant presented a triable issue as to whether her termination was in retaliation for obtaining MPLA leave.

In dismissing the claim the Court found that the claim had not been pled. Appellant contends that this constitutes an error of law, as it is an inappropriate and excessively narrow interpretation of Appellant's Amended Complaint. (AA-149.)

Further, the Court stated that it would have dismissed the claim in any event, again based upon its finding that Respondent had engaged in a legitimate RIF, and that Appellant was terminated pursuant to this RIF. As to that, Appellant contends that there was at least a genuine issue of material fact as to whether Respondent engaged in a RIF, and further presented a genuine issue of material of fact as to whether Appellant was terminated pursuant to that RIF, or whether the reliance upon the alleged RIF was pretext for a retaliatory discharge.

Appellant further alleged discrimination on the basis of her sex (pregnancy). As to this the Court determined that Appellant failed to make a *prima facie* case. The Court determined that Appellant had been terminated due to a legitimate RIF. In this the Court made inappropriate Findings of Fact that there had been a legitimate RIF, and

additionally inappropriately found in the face of disputed facts that the reason for Appellant's termination was the alleged RIF.

Continuing, the Court determined that because there had been a legitimate RIF, Appellant needed to present additional evidence of discrimination as part of her *prima facie* case. The Court then decided that the only way to present such additional evidence was "to point to a statistical or some other evidence of systemic discrimination on part of Defendant." (AA-22). This was an error of law. Appellant further argues that the Court inappropriately rejected Defendant's evidence of discrimination, assuming additional evidence was necessary based upon the erroneous conclusion that Respondent had established a legitimate RIF as a matter of law.

Appellant further contends that the Court erred in determining as a matter of law that Respondent had articulated a legitimate business reason for Appellant's termination. That is, the Court found that based upon an allegedly "undisputed factual record" that Appellant's position was eliminated "as a direct result of the severe economic downturn that affected the American economy in the latter part of 2008." (AA-25-26). These facts were not undisputed, in light of the fact that Appellant submitted evidence that other employees had been hired into Appellant's position while she was on leave, and other employees had been transferred into comparable positions before, during, and after Appellant's leave. It is not "undisputed" that the economic downturn was the cause of Appellant's termination.

Further, the Court also found that Appellant had been terminated because of her "long-term and on-going performance issues." (AA-26). Since the evidence was

disputed as to the reason of Appellant's termination, and evidence was disputed as to Appellant's relative performance, the Court erred in making this Finding of Fact that this was in fact Respondent's reason for terminating Appellant. For example, Jackie Moes, Regional Vice President of Robert Half Legal, testified by praising Appellant's performance numbers as "great" and "good." Appellant contends that the Court should have determined at a minimum that there was a genuine issue of material fact as to whether Appellant's legitimate business reason was in fact the reason for Appellant's termination. Appellant presented evidence that the stated reason was pretext in light of the fact that Respondent's administrative employees had testified that Appellant's performance was good, that her numbers met or exceeded expectations and that, contrary to the representation that a RIF was underway, employees were being hired and transferred before, during and after Appellant's leave.

Finally, Appellant contends the Court further erred in rejecting evidence of Respondent's overt statements of pregnancy animus and characterizing such comments as mere "stray remarks." In reaching this conclusion, the Court determined that "well established law" determines that hostile and discriminatory remarks by non-decision makers are not relevant to prove pretext. In so doing, the Court ignored case law presented by Appellant to the effect that "remarks made by non-decision makers, or made away from the decision-making process may be used to show that an employer's stated reason for discharging an employee is pretext for discrimination."

Appellant contends that the Court erred as a matter of law in dismissing her sex (pregnancy) discrimination claim under the MHRA.

ARGUMENT

STANDARD OF REVIEW

On appeal from summary judgment, this Court must determine (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. Gradjelic v. Hance, 646 N.W.2d 225, 230 (Minn. 2002); State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment is properly granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S SEX (PREGNANCY) DISCRIMINATION CLAIM.

The Court determined that the familiar *McDonnell-Douglas* burden-shifting analysis applied to Appellant’s claim. We do not dispute that. As noted by the Court, to establish a *prima facie* claim the Appellant must show “(1) that she is a member of a protected class; (2) that she was qualified for her position; and (3) despite her qualifications she was discharged.” (AA-21; Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986).)

A. Prima Facie Case.

The Court erred in determining that Appellant had not established a *prima facie* case. The three elements of the *prima facie* case are set out above. Respondent conceded that Appellant had met those three elements. (AA-58). However, the Court concluded that Appellant “must make an additional showing that her sex was a factor” based upon

the Court's erroneous conclusion that Appellant was terminated "as part of a reduction in force." (AA-21).

As stated previously, Respondent contends that it was engaged in a reduction of force in the last quarter of 2008. The facts here, as the record demonstrates, are very much in dispute. Respondent submitted many pages of "facts" which in many cases were exaggerations, and are only partial statements of the record. Those facts were disputed, although one could not tell it from the Court's conclusions. If one compares the Respondent's submission (AA-36-50) to the Court's Findings (AA-3-12) one will find that the Court adopted the Respondent's "Facts" almost verbatim. In so doing the Court either discounted, or simply failed to comment on, the Appellant's actual submissions.¹

Appellant was on maternity leave from late August of 2008 until December 1 of 2008. Noted she had been employed as a Recruiter for Robert Half Legal Permanent at the time she went on leave. On September 30, 2008, Jennifer Hedin was hired into Robert Half Legal Permanent, with a start date of October 13, 2008.

She was hired into the very same position that Appellant was in before she had gone on leave just one month earlier. (AA-81). Bird hired Hedin into Appellant's position despite the fact that she was aware of Appellant's leave and reinstatement rights. Id. Bird then did two things. She extended Appellant's leave to December 1, 2008. She also then transferred Hedin from Appellant's position, to the temporary side of the

¹The Court noted in Footnote 2 that it was setting forth the Facts "in the light most favorable to the Plaintiff" (AA-3, n.2). That of course is the correct statement of law, but it was not implemented in this case.

operation – on December 1, 2008. (AA-82). Despite the alleged on-going reduction in force, another employee, Michael Minick was hired at Robert Half Legal Minneapolis on February 7, 2008, and then promoted into a new position on November 1, 2008, exactly one month before Appellant was terminated – allegedly because there were no positions available. Id. (AA-83). Further, another employee, Lisa Breiland received an offer letter on November 13, 2008 to start on December 8, 2008, only six days after Appellant was fired. (AA-84).

The Court ignored this disputed evidence and found, as a matter of law, that Respondent had engaged in a RIF, based merely on Respondent’s presentation of the facts.

While Appellant was on leave, Respondent’s transferred employee Katie Miller from the permanent placement (“perm”) side to the temporary placement (“temp”) side of Robert Half Legal in the Minneapolis office. (AA-80.) In addition – and of particular note – Jennifer Hedin was hired on October 13, 2008, for the very same position that Appellant had held at the time she went on pregnancy leave. Given that Appellant was on an MPLA leave at the time, Respondent was statutorily obligated to reinstate her upon her return. If Respondent wanted to fill her position temporarily while she was gone, that was its right to do so. However, Respondent had (and has) no right to fill her position and then proclaim no position available for Appellant because it had filled that vacancy while she was gone on MPLA leave.

Indeed, the very day that Appellant returned to work, December 1, 2008, Hedin was transferred from perm to temp. Further, employee Michael Minick began at Robert

Half Legal Minneapolis on the temp side on February 7, 2008, and was promoted a division director position in that group sometime between October 16 and November 1, 2008. Katie Miller was transferred to temp while Appellant was on leave. Hedin was hired into Appellant's job while Appellant was on leave, and then transferred to the temp side the same day Appellant returned to work. Michael Minick was promoted within the temp side, which was apparently thriving enough to require a new division director, during Appellant's leave. Such undisputed events create a genuine issue of material fact as to whether or not Respondent was in fact engaged in a RIF during Appellant's MPLA leave and upon her return from leave. See Krause v. Bobcat Company, 297 F.Supp.2d 1212, 1217 (D.N.D. 2003) ("whether an employee is included in a RIF is a question of fact"); Moradian v. Semco Energy Gas Co., 315 F.Supp.2d 870, 876 (E.D. Mich. 2004) (given the evidence tending to show that the functions of a new employee's position changed after the RIF to mirror the former position raises a material question of fact prohibiting summary judgment); Vanderhoof v. Life Extension Institute, 988 F.Supp. 507, 516 (D.N.J. 1997) (whether or not Defendant actually engaged in a RIF presents a question of fact).

The Court inappropriately accepted at face value all of Respondent's proclamations concerning its motive and intent, ignored all of Appellant's evidence that challenged those self-serving assertions (despite the Court's statements that it was somehow nevertheless considering facts in the light most favorable to the non-movant (i.e., Appellant/Plaintiff), as is required upon a summary judgment motion), and concluded that Respondent had engaged in a RIF – *as a matter of law*. The factual issues

were highly disputed and the substantial controversy as to a core element of Respondent's case should have led the Court to determine that there was a question of fact as to whether Respondent engaged in a RIF.

Based upon its finding that Respondent engaged in the RIF, the Court then determined that Appellant needed to make an "additional showing" as an element of her *prima facie* case. The Court then concluded that the only way to make such a showing is "to point to a statistical or some other evidence of systematic discrimination" (AA-22). That is an incorrect statement of the law. Courts can consider "different types of evidence" to determine whether a professed RIF had occurred, or was the reason for termination. See e.g., Munsch v. Allient Tech Systems, Inc., 2001 WL 1636494 (D.Minn. 2001). This can include possible direct evidence of discriminatory animus or evidence that Respondent's alleged criteria for the RIF do not comport with underlying facts. It can include evidence that similarly situated people were treated differently. Statistical evidence is not the only form of such "additional evidence." Indeed, the Court relied upon Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 324 (Minn. 1995) and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1165-66 (8th Cir. 1985) for the proposition that in order to make such a showing Plaintiff "needs to point to statistical" evidence. (AA-22). That was error, given the fact that in Dietrich the Supreme Court expressly stated that "the 'additional showing' may take many forms and is not intended to be overly rigid." Dietrich 536 N.W.2d at 325, citing Holley, 771 F.2d at 1166. However, concluding that only statistical evidence would do, the Court determined that "nowhere in her brief does [Appellant] even attempt to make such a showing." (AA-22-

23.) That is true, in light of the fact that it is difficult to establish a statistically valid conclusion when the applicable pool is *one*.

By accepting only statistical evidence and rejecting the possible significance of any other form of evidence, the Court committed error. Appellant submitted into evidence comments that reflected discriminatory animus.

Appellant was demoted two months after Respondent learned that she was pregnant. (AA74-75). The Court rejected this evidence on the grounds that the demotion was outside of the statute of limitations. That may be true, but it does not make the evidentiary affect of that fact irrelevant. Regional Vice President Moes had been told by Appellant, and another employee that Hennen had stated that an employee was currently on a fertility program needed to be gotten rid of immediately, "now before she gets pregnant." Appellant herself had heard this comment. (AA-78); (AA-94). Appellant also testified to a first hand observation of a comment that an applicant could not be hired "because she is pregnant." (AA-95). In response to all of this Respondent argues only that these are stray comments, and apparently therefore irrelevant, and offers the very weak argument that of all of the women hired during Hennen's career, one of them had children. (AA-62) If the Court is looking for statistical validity, that fact alone suggests a discriminatory animus against the hiring of women with children.

Respondent was transferred shortly after she became pregnant the first time, and demoted almost immediately after she became pregnant the second time. Appellant further provided evidence that she was demoted from her position as the Division Director, that was because there was no longer going to be a Division Director and that

she herself was doing a “great job”. (AA-75). However, shortly after this falsehood Hennen replaced Appellant with her good friend Jessica Kuhl. Id. To the extent that “additional evidence” was necessary the above was sufficient to at least create a genuine issue of material fact. Further, the Court apparently rejected as unworthy of comment the central fact, undisputed, that Appellant was brought back from her pregnancy leave on one day and fired the next. From this evidence a jury could reasonably conclude that Respondent, unhappy with the restrictions that Appellant’s pregnancy imposed upon her availability, wanted to get rid of her but knew that it would be dangerous to get rid of her while she was on MPLA leave. Accordingly, a jury could reasonably conclude that Respondent thought it wise to simply wait until she came back and then fire her under the pretense that it had in fact returned her from leave as it was obligated to do. “A reasonable juror could conclude from such very close temporal proximity that [the employer] was simply waiting for the expiration of [the employee’s] FMLA leave” to terminate her. Podkovich v. Glazers Distributors of Iowa, Inc. 446 F.Supp.2d 982 (ND Iowa 2006).

The Court committed an error in requiring Appellant to present “additional evidence”, and further erred in concluding that Appellant had not presented such additional evidence.

B. Legitimate Business Reason.

The Court made two alternative Findings. It first found that Plaintiff was fired “as part of a bona fide reduction in force compelled by the severe economic downturn of 2008.” (AA-23). Alternatively – but inconsistently – the Court determined that the

“legitimate non-discriminatory reason” for Plaintiff’s termination was her alleged “long-standing failure to perform at a level expected from an employee with her tenure.” (AA-24).

If Appellant’s position truly was eliminated, there would be *no need* to evaluate her performance. However, as set out above, there is a question of fact as to whether Respondent in fact engaged in an legitimate RIF.

If, alternatively, Appellant was terminated due to her performance, then the record must be evaluated to determine if there is a question of fact as to whether that is the true reason, or is it pretext.

C. Pretext.

The Court stated that it was “undisputed” that Appellant had “longstanding under performance” (AA-23) and was a “subpar recruiting manager in 2008” (AA-24). The Court found that her performance was “the lowest”. *Id.* These facts however were disputed. Jackie Moes was Regional Vice President of Robert Half Legal and Appellant’s Supervisor from 2005 through June of 2008 (i.e. two months before Appellant went on leave). (AA-71). She promoted Hansen to Division Director in January of 2008, concluding that she had the performance drive and leadership abilities necessary to succeed in that position. (AA-72). She testified that Appellant had “good numbers, relative to the rest of the team” she had “great numbers. She had good numbers. Yeah.” (AA-75). While the Court found that Appellant had been “repeatedly” advised of performance issues (AA-24) the fact is that she had exactly one conversation in which performance was addressed, that in July of 2008 at that time, Amber Hennen

told her that she was doing a “great job.” Id. Respondent contended, (and the Court accepted) that Appellant was removed from her Divisional Director position because of her performance, the fact is that she was told that she was being removed from the position because there was no longer going to be a Division Director (which in and of itself is proof of pretext because in fact Hennen replaced her with her good friend Jessica Kuhl shortly thereafter) Id. Indeed, Appellant put before the Court evidence that in the timeframe considered Appellant in fact ranked either first, or second in the entire office every month. (AA-88.) While Respondent argued, and the Court agreed that Appellant was one of the lowest performance in the entire central zone, the Court had in front of it (but did not comment on) evidence that only two employees in the entire central zone met their monthly targets, and Appellant was one of them. (AA-89.)

Further the Respondent argued that the unalterable benchmark of minimum performance was a per desk average (PDA) performance figure of \$25,000 per month. The Court accepted this as true, and ignored the disputed evidence. (See AA-4-7.) While \$25,000 per month was stated as a general expectation or target, in fact the monthly PDA target routinely changed every single month, and moreover changed during the course of the month. (AA-73). If it was obvious that an employee was not going to hit \$25,000 in a given month, the target number was simply lowered, and thusly reported to Bird. Id. Appellant offered (but the Court made no comment on) evidence that as of February of 2008 only eight of the twenty-three employees in Robert Half Legal Central hit the \$25,000 figure, and thirteen of them had failed to reach that figure two months in a row. 65% of all employees were short of that figure. (AA-76). Indeed, Appellant presented

evidence that there was not a single month in which all employees achieved the \$25,000 target. (Id.) While the Respondent argued (and the Court agreed) that the reason for Appellant's termination was her failure to consistently hit the \$25,000 target, Appellant presented evidence from Regional Vice President Moes that the actual "bottom line" figure was \$16,000. \$20,000 per month was considered average and \$16,000 per month was in fact the bottom line. Id. In May of 2008 Appellant's PDA was \$25,909.00, the highest in the entire office. (AA-77). Indeed, in the first half of 2008, Appellant ranked as high as first, and never lower than fourth of all of the Robert Half Legal Minneapolis Permanent placement members. (AA-88). If one's recruiting earnings are less than one's draw, one is considered to have gone negative on their draw. Hansen never went negative on her draw. Jessica Kuhl, whom Hennen promoted after Appellant was demoted, did. (AA-89).

On December 1, 2008, Appellant was returned to her position. That same day Jennifer Hedin was, quite literally, removed out of the Appellant's chair, and placed in a chair in the temporary side of the operation. Appellant was fired, and Hedin was not. There was, and remains – at a minimum – a question of fact as to whether Appellant's performance was indeed substandard, whether reviewed across the board vis-à-vis the other Robert Half Legal recruiting managers on the permanent placement side, or compared specifically to Hedin or to Katie Miller (who had likewise been transferred from permanent to temporary shortly before Appellant's termination.), there was at least a question of fact if Appellant was the worst.

Respondent contends that in making the determination regarding who was terminated, the considered the performance of all of the employees in each of the offices of Robert Half Legal within the central zone, “as well as their relative tenure with Robert Half Legal.” (AA-48.) Again there is at least at a minimum a genuine issue of material fact as to that issue. Appellant’s tenure with Robert Half Legal was approximately 4½ years. Hedin’s tenure with Robert Half Legal was approximately 6 weeks. At the time of Appellant’s termination, Hedin’s tenure in Robert Half Legal’s temporary placement group was approximately 12 hours. Furthermore, in the second and third quarters of 2008, Katie Miller’s PDA numbers were \$5,920.20 and \$17,260.42, respectively; Appellant’s were \$22,555.92 and \$15,371,71 (and Appellant only worked through mid-August). (AA-113.)

Even assuming there had been a RIF, “in the RIF context Courts consider three common types of evidence in determining whether the RIF is pretextual: 1) evidence that the termination of the employee is inconsistent with the employer’s RIF criteria; 2) evidence that the employer’s evaluation of the employee was falsified to cause termination; or 3) evidence that the RIF is more generally pretextual.” Roland v. Franklin Career Services, LLC, 727 F.Supp.2d 1188, 1205-06 (D. Kan. 2003).

(i) The Termination of Appellant Was Inconsistent With Respondent’s Alleged RIF Criteria.

Miller was transferred and not fired. She had less tenure than Appellant. Hedin was hired, and then transferred, and compared to Appellant had no tenure. Respondent was not consistent with its RIF criteria. Respondent claims to have considered tenure,

but the facts are inconsistent. Respondent contended that Appellant was the worst performer, but the facts are inconsistent. This inconsistency between stated reason and reality is evidence of pretext.

(ii) Appellant Presented a Genuine Issue of Material Fact That Respondent Had Falsified Its Evaluation.

As noted above, the Court considered heavily disputed material facts, including inconsistent evidence as to performance, and found that Appellant's performance was worthy of termination. The Court's analysis demonstrates that it ignored Appellant's evidence, and exaggerated Respondent's evidence as it relates to the Respondent's ability to manipulate and falsify the performance numbers.

As an example, it was uncontested that Appellant's production was exemplary, resulting in her promotion, in 2008. In an attempt to minimize this, Respondent argued that Appellant's 2007 production "*may have been*" due to her inheritance of a "book of business" from another employee. (AA-43). In support of this Respondent cited the deposition of Amber Hennen, in which she had testified merely that Hennen "*thought*" that Appellant's numbers may have been inflated due to that book of business. (Hennen deposition, p. 27, attached as Exhibit A to the Nolan Affidavit in Support of Respondent's Motion for Summary Judgment.) The Court, however, exaggerated this speculation into the declaration that Appellant's business had been "dramatically increased" due to this inherited business. (AA-5.)

At the same time, Appellant presented evidence that her performance numbers were subject to manipulation in a number of ways. As noted previously, they could be

affected by when Hennen determined to declare a “fall off.” Respondent created the documents upon which they proclaimed to have established Appellant’s PDA, but those documents themselves are inconsistent. For example, Respondent produced documents that reported both that Appellant’s PDA in the first quarter of 2008 was \$18,070.61 and that it was \$34,999.36. (AA-77.) Respondent has never articulated the divergence between these numbers. If the Court in fact was taking the facts in the light most favorable to Appellant, as the Court claimed, it should have then taken Appellant’s PDA to be a few pennies short of \$35,000, well above the \$25,000 minimum target.

Further, Appellant presented evidence that other employees departed and their respective books of business were then “inherited” by other employees – but not by Appellant.

The Court found as a matter of law based upon the speculation of one employee that Appellant’s performance was “dramatically” increased when she inherited a book of business. In the same way then the Court should have equally found that Jessica Kuhl’s book of business was “dramatically increased” when Amber Hennen assigned it to her, and not to Appellant. Thus the PDA’s themselves on which Respondent’s rely are at their core subject to manipulation. This is further evidence of pretext.

D. Appellant Presented Sufficient Facts to Suggest That The RIF Was “Generally Pretextual.”

Respondent contends that it was firing -- not hiring – in the fourth quarter of 2008. Yet Appellant was “hired” or more specifically returned to work on December 1, 2008. Exactly what occurred in the following 36 hours to affect Respondent’s business such

that Appellant had to be terminated has never been articulated. Most obviously pretext can be found in the affirmatively false statements made to Appellant at the very moment of her termination. She asked if there were other positions open in Robert Half Legal, and was expressly told that there were not. In fact, set out previously, others were hired before, during, and after her termination. At almost the same moment she was being told there was no position anywhere in Robert Half Legal, Jennifer Hedin was being transferred to her now position on the temporary side of Robert Half Legal.

There obviously were positions open in Robert Half Legal. Pretext is found in the testimony of Bird, where she testifies that Appellant was not transferred to temporary because allegedly Appellant had never expressed any interest in that position. (AA-84). That is completely false. Appellant was advised that she was being “downsized” on December 2, 2008, and she asked Hennen if there were any other positions available. She was told there were not. When she then asked to speak to Jim Kwapick, Appellant was advised that she could not talk to him because “there is nothing else”. At this point Appellant specifically asked Hennen if there was positions available on the temporary side of the operation, and was explicitly told that there was nothing available. (AA-95-96). If there was nothing available in temporary, it was only because Respondent had hired Hedin to replace Appellant while she was on leave, and then removed her from Appellant’s chair to a different chair the same day that Appellant returned to work. We will give the benefit of the doubt and presume that Bird was unaware of Hedin’s request to move into the open temporary position. It doesn’t matter if she was ignorant, or falsified her testimony, because intent does not matter on the reinstatement claim. She

had an absolute right of reinstatement, and Respondent breached its statutory obligation in refusing to either reinstate the Appellant into her existing position, or reinstate her into the comparable position of recruiting lawyers and secretaries for temporary positions as opposed to permanent positions.

II. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THERE WAS NO RIGHT TO RETURN UNDER THE MINNESOTA PARENTING LEAVE ACT WHEN DEFENDANT HAD EXTENDED PLAINTIFF'S LEAVE BEYOND SIX WEEKS.

As addressed above and set forth in the record, the MPLA provides an employee who takes leave under the act the statutory right and entitlement to be reinstated upon conclusion of such leave to his or her “former position or in one of comparable duties, number of hours and pay. Minn. Stat. § 181.942, subd. 1(a). The Court erred, simply and fundamentally, when it determined that Appellant was not entitled to such reinstatement based on the record in this case.

A. Refusal to Reinstatement Constitutes Interference With an Employee's Rights Under MPLA.

To begin, the reinstatement language of the MPLA tracks that of the FMLA, which provides for reinstatement to “an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” 29 U.S.C. § 2614 (a)(1)(B).² The FMLA provides a prescriptive right of reinstatement and the failure to

²As Defendant noted in its memorandum in support of summary judgment (AA-54), and demonstrated by the trial court throughout its Order and Memorandum, Minnesota courts have found that state statutes are to be interpreted in accordance with equivalent federal statutes “when statutory text and purposes are aligned.” Friend v. Gopher Co., Inc., 771 N.W.2d 33 (Minn. Ct. App. 2009). As to this aspect, the statutory

provide reinstatement constitutes interference under 29 U.S.C. § 2615(a)(1). Such employee must be restored to her or his former position, or to an equivalent position with equivalent benefits paid and other terms and conditions. An “equivalent position” is “one that is virtually identical to the employee’s former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill effort, responsibility, and authority.” 29 C.F.R. § 825.215(a). The MPLA, in slight contrast, provides that an employee return to employment in the employee’s “former position or in a position of *comparable* duties, number of hours and pay. Minn. Stat. § 181.942, subd. 1(a) (emphasis added).

In this case, and as the record before the trial court showed, former regional vice president of Robert Half Legal, Jackie Moes, testified expressly concerning the fact that the positions of account executive in Respondent’s temp group and recruiting manager in its perm group were positions encompassing comparable duties. (AA-78-79.) This fact is also readily apparent in light of the ease with which Respondent transferred employees such as Miller from temp to perm, and back to temp, and Hedin (the latter of whom had considerably less experience than Appellant) from perm to temp.

Here the court concluded as a matter of law that “being an account executive on the temp team is not an equivalent position to being a recruiting manager on the perm

language is similar. The state statute is different in one important aspect – unlike the FMLA, it expressly provides for the extension of leave by the employer. The court ignored that language.

team.” (AA-19, n.12). In support of this, the court noted only that the hours were different and required a schedule that “plaintiff cannot meet.” Whether Appellant could meet those hours of course is at least disputed, in light of the fact that Appellant expressly asked to be transferred into that position and was expressly told that she could not.

Where the differences between the positions are a *de minimus* salary grade, and all other aspects of the job are nearly identical, “at the very least, whether the ‘new’ position was a demotion or a substantial equivalent, employment opportunity is a disputed issue of fact for the jury to resolve.” Pizzo v. HSBC USA, Inc., 2007 W.L. 2245903, *9 (W.D.N.Y.). See also Reid-Falcone v. Luzerne County Community College, 2005 W.L. 1527792, *7 (M.D.P.A., June 28, 2005) (determining equivalency of job positions is usually a question of fact); Parker v. Hanhemann University Hospital, 234 F.Supp.2d 478, 489 (D.N.J. 2002) (determining whether a job is “equivalent” under the FMLA is generally a question for fact for the jury.) Jobs are substantially similar, or comparable, if they involve “the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.” 29 C.F.R. § 825.215(a). According to Regional Vice President Moes, both temp and permanent recruiting were absolutely involved in the same responsibilities, and “the job skills that serve one well also serve the employee well in the other.” (AA-78-79). (Plaintiff 11). There was at least a question of fact as to whether the two jobs are comparable and the court erred in concluding as a matter of law that they were not (particularly where the court relied only on the testimony of Moes, who testified in fact that they were).

“Because the issue is a right to an entitlement, the employee is due the benefit if the statute requirements are satisfied, *regardless of the intent of the employer.*” Crevier v. Thomas Spencer, 600 F.Supp.2d 242, 255-56 (D.Mass 2008) (emphasis added). “These rights are essentially prescriptive, setting substantive floors for conduct by employers, and creating entitlements for employees.” Id., n.18. Furthermore, interference claims are analyzed under an objective test, as opposed to the *McDonnell-Douglas* burden-shifting framework. Rankin v. Seagate Tech., Inc., 246 F.3d 1145, 1148 (8th Cir.2001). Accordingly, an employee must simply show by a preponderance of the evidence that he or she was entitled to the benefit denied. See Strickland v. Water Works and Sewer Bd., 239 F.3d 1199, 1206-07 (11th Cir. 2001). Thus a violation by an employer of the reinstatement rights of the statute are violations *per se*. Neither motive, intent nor discriminatory animus is an issue. Assuming, hypothetically, a right to reinstatement, an employer’s failure to reinstate an employee to a same or comparable job, is a violation of the statute. Such is the case here, and the Court erred in determining otherwise.

In this case, Respondent’s own *Leave of Absence Manual* confirmed the right to such reinstatement. Under the caption of “position reinstatement” is the following:

Upon completion of an approved leave of absence an employee will be reinstated to the employee’s former position *or a position that is substantially similar* to the employee’s former position without reduction in pay, benefits or service. The exception is if the position or substantially similar position ceases to exist because of legitimate business reasons unrelated to the employee’s leave.

(AA-167 (emphasis added).) With respect to the events surrounding Appellant's termination one day following her return from MPLA leave, if a substantially similar position ceased to exist at that time, such occurred only because Respondent chose to fill it with someone else and then declare it to be unavailable to Appellant. As demonstrated by the hirings, transfers and promotions – described above – of the likes of Jennifer Hedin, Katie Miller, Michael Minick and Lisa Breiland. The Court rejected this argument. In doing so, it ignored the evidence and record created by Appellant – and thereby obvious genuine issues of material fact – and failed to abide by the requirement incumbent upon every trial court in the State of Minnesota that, upon a motion for summary judgment, the court view the evidence in the light most favorable to the non-movant. (See AA-14.)

B. The Court Erred Fundamentally in Finding That Appellant Sought Leave Under the FMLA and Not Under the MPLA.

A key determination of the Court's analysis related to whether Appellant ever even sought leave under the MPLA. The Court determined that Appellant had never requested such leave: "here, the only request for leave was made for short-term disability leave under the FMLA." (AA-15.) In reaching its conclusion, the Court again accepted the facts as precisely the *moving* party suggested them, ignored the contrary facts from the non-moving party and made inappropriate findings of fact inconsistent with the record.

This unfortunate result started with the Respondent's misrepresentation of the record. That is, in its moving papers, Respondent inaccurately stated that Appellant had

requested leave only under the FMLA. (AA-46). Respondent contended that it then sent Appellant a letter dated September 11, 2008, “confirming her FMLA leave and expressly stating that Plaintiff had ‘no guarantee of reinstatement’ if she took more than 12 weeks of leave,” relying upon the Bird Affidavit, Ex. C, as is its sole support. (Id.). That is not what the letter says. “At the conclusion of your short-term disability/FMLA leave, a Personal Leave may be granted at the discretion of your manager for up to 4 weeks. An employee on Personal Leave has no guarantee of job reinstatement to any position at the conclusion of a Personal Leave.” (Id. (emphasis added).)

To understand that statement, it is necessary to understand Respondent’s leave policy in full. (AA-162). Part II of Respondent’s Leave of Absence Manual (LOA Manual) is entitled “Leave Policy Details” and provides a breakdown of its various programs. (AA-169.)

The position reinstatement provision has been quoted above and is found on p. 6 (AA-167). Appellant was entitled to reinstatement in her former position or one available in a substantially similar position. As the leave policy makes clear, Respondent grants different types of requests depending upon the nature of the condition (i.e., pregnancy, FMLA, workers’ compensation, and things of that nature). As stated in part (II), paragraph 1 (p. 8) (AA-169), Respondent provides “Short Term and Pregnancy Disability Leave” for employees that are unable to work due to “pregnancy/childbirth.” This leave is distinct from FMLA, which is set forth separately in the LOA Manual. However that same provision identifies that there may also be FMLA leave available, the

“interrelation” of which is set forth in Section III. (Id.) Notably, it also specifically advises employees as follows:

State law may extend disability leave for disabilities related to pregnancy and childbirth. In such instance [Respondent] *will extend the leave of absence to parallel the requirements of the applicable state law.*

(Id. (emphasis added).)

Section III then discusses both FMLA leave and pregnancy disability leave. It is provided specifically that a pregnancy leave may be governed by Respondent’s short-term medical and pregnancy leave provisions “*and the FMLA as described below,*” where, as here, the employee is eligible for both. (Id. (emphasis added).)³

Accordingly, Respondent’s policy expressly states that where she is eligible for both, the time away from work for pregnancy “will be charged to the employee’s available time under both the short-term medical leave and FMLA leave...” (Id., part III(a)(iii).) Accordingly, Appellant was eligible for leave both under the MPLA and FMLA. The court’s finding that she was not is erroneous.

Furthermore, the LOA Manual explicitly identifies “Discretionary Personal Leave” as a discrete form of leave, separate from both FMLA leave and pregnancy disability leave. (AA-177.) This provision details such leave as being no more than four weeks in duration and one that requires management approval. (Id.) It also provides that “[a]n employee on personal leave of absence has no guarantee of job reinstatement to any

³The FMLA has certain mandatory prerequisites as to length and tenure of service prior to eligibility for FMLA. Appellant had met those eligibility requirements. Therefore, according to Respondent’s policy, she was eligible for both.

position at the conclusion of the personal leave unless the employee obtains the written agreement from his/her supervisor prior to the commencement of the personal leave.”

(Id.) The September 11, 2008 letter, upon which Respondent relies, refers precisely such discretionary personal leave, which is separate and discrete from pregnancy disability leave – here MPLA leave – or FMLA leave. Bird expressly testified that Appellant did not take a personal leave at any time. Therefore, the letter, which made clear there is no guaranteed right of reinstatement from a personal leave is entirely irrelevant in that Appellant never received a personal leave. However, it was that one statement from that one letter that caused the court to hold as a matter of law that Appellant never took an MPLA leave and had been advised that she had no reinstatement rights should her maternity leave be extended. This was error.

Two paragraphs into its analysis of Appellant’s MPLA claims, the Court went off-track by reaching the incorrect factual finding that Appellant had requested leave only under the FMLA and not under the MPLA, notwithstanding the fact that the Court even refers to the fact, parenthetically, that Appellant’s request for leave occurred by means of the paperwork she filled out from Respondent. The Court’s finding is contrary to all of the evidence on the record.

As Appellant noted in her response papers (AA-84), she requested *maternity leave* and was granted *maternity leave* pursuant to Respondent’s leave of absence forms. The

related personnel action form is in the record as Bird Ex. 9⁴ (AA-158.) In the upper left-hand corner are six different boxes to be checked for the type of leave. Box no. 3 is FMLA. That box is not checked. Box no. 2 is maternity. That box is checked.

Below that is a caption entitled “Documents Required”; there are then 5 categories of documents, depending upon whether it is a maternity leave, FMLA leave, personal, workers’ compensation or military. None of the boxes are checked under FMLA leave. Instead, the documents requested *per the Respondent’s form* are those requested for *medical/maternity* leave. That document only can be read that Appellant requested a maternity leave and did not request an FMLA leave.

Indeed, the *Leave of Absence Request Form* is signed by Appellant; it specifically requests leave related to a “*pregnancy-related disability*” and indicates, “My expected date of delivery is 9/24/08 (*had baby 8/29/08*)” (emphasis added). Section B of that document, entitled Request for Leave Under Family and Medical Leave Act (FMLA), is *entirely blank*.

Similarly, Bird Ex. 12 again checked *maternity* leave and not the FMLA leave box and expressly stated that it was “extending existing leave” to 12/1/08. (AA-159) (Harder Aff., Ex. X.) By email dated October 29, 2008, Marilyn Bird then expressly agreed to approve “Kim Hansen’s current LOA to be extended until 12/1.” (AA-160.) (Harder Aff., Ex. Z.) Bird again did the same on December 1, 2008. (AA-161.) (Harder Aff., Ex. AA.)

⁴Attached to the Affidavit of Thomas A. Harder as Ex. W and filed in conjunction with Appellant’s response papers.

Accordingly, *every* document submitted by Appellant and signed off on by Respondent expressly identifies the leave as a pregnancy leave and nowhere identifies the leave as an FMLA leave (or a personal leave). Undeterred, Respondent argued in reply that Appellant's leave was "under the FMLA, not the MPLA" and states, falsely, that all paperwork sent to Plaintiff in conjunction with her leave indicates that the leave was taken under the FMLA. (AA-133-35).

With that misstated record, the Court continued to make erroneous Findings of Fact and concluded "[i]n all communication between Plaintiff and defendant regarding her leave, the parties refer to the leave as being taken under the FMLA," and "[a]t no point did Plaintiff ever attempt to invoke leave under the [MPLA]." The Court then concludes, mistakenly: "Under the plain language of the [MPLA], absent a request for [M]PLA leave, Plaintiff is not entitled to the protection of the [MPLA]." On the contrary, the record sets forth with incontrovertible clarity that such is not the case. Appellant indeed invoked her proper right to leave under the MPLA, and Respondent's own paperwork confirms its understanding of this basic fact.

C. The Court Similarly Erred in Finding That Appellant Lost Any MPLA Reinstatement Rights Because Her Leave Exceeded Six Weeks.

In finding that Appellant lost any MPLA reinstatement rights she may have had because her leave exceeded six weeks, the Court engages in analysis that is pervasively – and plainly – flawed. In its Order and Memorandum, the Court indicates that "the record before the Court conclusively established that Plaintiff's 13-week maternity leave far exceeded the length of a leave protected by the [MPLA]." (AA-15.) The Court then

provides a block quotation of Minn. Stat. § 181.941, subd. 1, the provision of the MPLA that provides for, among other things, six-week leave. The Court goes so far as to emphasize, in underlined text, the cornerstone of its argument on this front, namely that leave under the MPLA “may not exceed six weeks.”

Surprisingly, the Court fails to appreciate or recognize the phrase *immediately thereafter*:

Subdivision 1. Six-week leave; birth or adoption.
An employer must grant an unpaid leave of absence to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child. The length of the leave shall be determined by the employee, but *may not exceed six weeks, unless agreed to by the employer.*

Minn. Stat. § 181.941, subd. 1 (emphasis added).

As discussed above, and as the undisputed record reflects, Appellant exercised her right under the MPLA and requested maternity/pregnancy leave – not FMLA leave. Further, Respondent’s own documents set forth its awareness – and processing – of Appellant’s leave as maternity leave. Finally, Respondent’s personnel, in the form of i) Central Zone President Bob Clark and Minneapolis office Branch Manager Amber Hennen (AA-159), and ii) Central Zone District President Marilyn Bird (AA-158, 160-61), explicitly agreed to and approved, in writing, the extension of Appellant’s maternity leave under the MPLA. Such facts make it difficult to understand Respondent’s assertion, espoused by the Court, that “Defendant . . . never agreed to any leave under the [MPLA], let alone agreed to a 13-week leave under the [MPLA].”

The Court in fact bases its analysis at this point in the aforementioned September 11, 2008 letter from Benefits Coordinator Jennifer Kirk to Appellant and the reference therein to the fact that an employee on *personal leave* has no guarantee of job reinstatement. However, the Court appears to overlook or fail to understand the fact that personal leave is a separate, discrete form of leave – different from maternity/pregnancy leave (and FMLA leave, for that matter). None of Respondent’s own documents, as discussed above, reflect that Appellant was seeking or taking a personal leave at any time. Indeed, Appellant’s Leave of Absence Request Form and all of Respondent’s subsequently generated personnel action forms related to her request (including the Extend Existing Leave form (AA-159) reflect only maternity leave. Any sections, blanks or boxes for “personal leave” are *empty*. Far from being “sufficient to establish as a matter of law that Defendant did not agree to a 13-week maternity leave with a continued right to reinstatement under the [M]PLA,” (AA-16), that letter – and the exhibits discussed – confirm that Appellant sought and received maternity leave, falling under the MPLA, with an agreed upon return date of December 1, 2008.

In its analysis, the Court employs different vocabulary in a manner that would seem to suggest that Respondent’s agreement to Appellant’s extended leave was a more passive concurrence and something less than *agreement*: “Accordingly, the Court specifically rejects Plaintiff’s argument that Defendant is somehow stopped from arguing that Plaintiff lost her right to reinstatement by merely *permitting* a leave to last longer than 12 weeks.” (AA-17, n. 10 (emphasis added).) And again: “The Court refuses to hold that Ms. Bird’s *consent* to Plaintiff’s taking a maternity leave longer than the

statutorily protected amount under either the [M]PLA or the FMLA constitutes Defendant's agreement to extend the reinstatement protections of those statutory schemes to Plaintiff." (AA-16-17 (emphasis added).)

If the evidence had been disputed on that issue, the court should have instead found that there is a genuine issue of material fact and denied Respondent's motion for that reason. However, the evidence was undisputed in that all of the leave requests were for medical leave and *none* of it was for FMLA. Indeed, the court relied only on Bird Affidavit Ex. C, the September 11, 2008 letter. As noted, that document did not state that Appellant had taken FMLA leave, but instead "short term disability/FMLA leave." Furthermore, such language was not on the leave application form, but instead appears on a letter generated internally by Respondent's benefits operations department. As to the statement that there was no reinstatement rights, that letter expressly states that there is no guarantee of leave rights if Appellant took a "*Personal Leave*" at the conclusion of and in addition to her maternity leave. Appellant did no such thing. As discussed above, and set forth in the LOA Manual, personal leave is a completely separate and distinct form of leave. Additionally, Marilyn Bird expressly testified that Appellant *did not take a personal leave*. (AA-87.) While Respondent claimed falsely that this letter guaranteed no reinstatement rights for FMLA leave longer than twelve weeks (as opposed to personal leave), we noted in response that "the letter makes not (sic) such statement – express or otherwise." (A-84).

Accordingly, the court should have found, at a minimum, that there was a genuine issue of material fact as to this issue. More appropriately, the court should have found no

genuine issue of material fact, but instead found that Appellant applied for pregnancy leave, and that Respondent expressly continued such leave until December 1, 2008.

D. The Court Errs in Its Analysis of FMLA Case Law Concerning Reinstatement After Extended Leave.

In its Order and Memorandum, the Court takes issue with Appellant's citation in her response papers to Santaosuosso v. NovaCare Rehabilitation, 462 F.Supp.2d 590 (D.N.J. 2006), and that particular court's holding that "in light of the Congressional encouragement for employers to provide more generous benefits than mandated by the law . . . Plaintiff should not lose her FMLA protection for taking a leave longer than 12 weeks when her employer gave her the permission to do so." Id. at 598 (citing to 29 U.S.C. § 2653). The Court notes that "[t]he Santaosuosso case relates solely to an FMLA claim, a claim which is not before this Court." (AA-16, n. 9.) This is indeed true with respect to Appellant's pled claims, for in fact Appellant sought relief under the MPLA and *not* the FMLA.

As already discussed, the MPLA provides expressly and unambiguously that the six-week leave period may be extended – and no maximum period of extension is set forth in the statute – if the employer agrees to such extension. Such is the case here, as the record reflects. The FMLA, in contrast to the MPLA, does not provide for extension of leave by agreement between employee and employer. Instead, the FMLA states:

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

29 U.S.C. § 2653. Thus employers are encouraged – or at least *not discouraged* – from offering more generous leave policies than the 12-week period under the FMLA. The FMLA does not contain language identical or analogous to that found in Minn. Stat. § 181.941.

Although the Court notes that Appellant brought suit under the MPLA, it engages – beginning on the same page – in analysis of FMLA case law which it believes stands for the propositions that i) the extension of *FMLA* leave beyond the length of time for which the employee is otherwise eligible under the express provisions of the FMLA does not extend the right to reinstatement; and ii) employers cannot be estopped from contending that an employee has lost the right to reinstatement when her or his leave is extended beyond the typical twelve-week period.

To begin here, it is noteworthy that the cases in to which the Court cites (AA-16) are all distinguishable on the facts. For example, in Eklind v. Cargill, 2009 WL 2516168 (D.N.D.), the employee who had obtained FMLA leave was physically unable to return to work due to her illness at the end of the protected leave period. 2009 WL 2516168 *6. As a result, she received medical leave from her employer that lasted more than eleven months. (Id.) In its analysis, the Eklind Court found that

as to any representations which may have been made regarding Eklind's restoration upon her return from leave, Eklind cannot prove that she detrimentally relied on those representations, or that the representations caused her not to return to work before the expiration of the FMLA leave period, because she was physically unable to return to work at the end of the twelve-week protected period in any event due to her serious and ongoing health condition.

(Id., (citing Baker v. Hunter Douglas, Inc., 270 Fed. Appx. 159, 164 (3rd Cir.2008)).

Thus the Eklind Court did not reject the notion that an employer may be estopped based on its conduct from denying the right to reinstatement; rather, it simply found that because of the employee's ongoing illness, which far exceeded the twelve-week leave period, she could not have detrimentally relied on any representations from her employer concerning reinstatement.⁵ This is stark contrast to the instant case, in which it is indisputable that Appellant returned to work on schedule and as had been approved.

In every case the court relied upon,⁶ the employee was unable to return to work at the end of the extended leave. Those cases stand for the proposition only that the guaranteed leave and the guaranteed right of reinstatement is 12 weeks, and if the employee cannot return at the end of that time, she has no right of perpetual leave. Moreover, if the employer extends the leave, the employee must be able to return to work at the end of that extended period, and if not, that employee loses his right of reinstatement. However, none of those cases remotely hold that where a leave has been extended, and the employee is able to return to work (or, in our case, actually does return to work), has that right of reinstatement been lost. Conversely, in each and every case cited by Appellant in the following pages the courts held that where an employer extends

⁵The other cases to which the Court cites in its Order and Memorandum at AA-16 are similarly distinguishable on their facts and inapplicable to the instant case.

⁶Highlands Hospital Corp. v. Preece, 2010 W.L. 569745 (Ky. Ct. App., Feb. 19, 2010); Manns v. Arvin Meritor, Inc., 291 F.Supp.2d 655, 660 (N.D. Oh.); Grosenick v. Smith Klein Beacham Corp., 454 F.3d 832, 836 (8th Cir. 2006).

the leave, and the employee is able to return to work within the extended period, the employer is estopped from denying the right of reinstatement.

Furthermore, Hearst v. Progressive Foam Techs., Inc., 647 F.Supp.2d 1071 (E.D. Ark. 2009), hardly supports the Court's position. There the employer granted the employee FMLA leave within his first twelve months of employment despite the fact that he would not have been eligible under the FMLA. The employee subsequently demanded more leave, claiming that the first weeks could not be counted as FMLA leave, because he was not eligible for such leave (despite the fact that it had been expressly granted by the employer). Under that strange circumstance, the Court noted that "equity trumps Plaintiff's position." 647 F.Supp.2d at 1073. The Court made clear that equity prohibits an employer from engaging in such sharp practices noting that "it is well settled that *equitable estoppel* is an available remedy in FMLA cases". Id. (emphasis added).

The Court noted the typical situation as precisely the one at play in the instant case; i.e. "the typical situation involves an employer designated an employee's leave as FMLA leave, the employee's reliance on the employer's representations, and the employer's later argument that the employee did not qualify for FMLA leave." That is precisely what Respondent has done here, and the Court noted that in such a situation "an employer is prevented from granting FMLA leave then recanting, later arguing that the leave was not under the FMLA ..." Id. at 1074.

However in the Hearst situation, the employee had essentially engaged in the reverse of that behavior, and the Court noted that "for the same equitable principles, [the

employee] cannot take leave – that all parties believe to be FMLA leave – only later to recant this position and demand twelve additional weeks.” Id.

As to the “well settled” position that an employer cannot grant the leave but then refuse to reinstate, the Court relied upon Duty v. Norton-Alcoa Proppants, 293 F.3d 481, (8th Cir. 2002); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579 (7th Cir. 2000); Woodford v. Community Action of Greene County, Inc., 268 F.3d 51 (2nd Cir. 2001); Minard v. ITC Deltacom Communications, Inc., 447 F.3d 352 (5th Cir. 2006). See Hearst, 647 F.Supp.2d at 1073, n. 24.

The Court could have cited the following additional cases to establish the “well settled” proposition that a Respondent cannot do what Respondent did here: Kosakow v. New Rochelle Radiology Associates, P.C., 274 F.3d 706, 724-25 (2nd Cir. 2001); and Wolke v. Dreadnought Marine, Inc., 954 F.Supp. 1133, 1137 (E.D.Va. 1997). Rager v. Dade Behring, Inc., 210 F.3d 776, 778-79 (7th Cir. 2000); Athmer v. CEI Equipment Co. Inc., 121 F.3d 294, 296-97 (7th Cir. 1997); and General Electric Capital Corp. v. Armadora, SA, 37 F.3d 41, 45 (2nd Cir. 1994).

However, the resort to promissory or equitable estoppel, while completely appropriate in the case at bar, is not even necessary. Most of the above cases arise in the context in which an employee in fact was not eligible for leave or had over-extended the leave, but the employer had nonetheless provided FMLA leave; the employer subsequently took the position that there was no need to return the employee to work because the employee had not been qualified in the first place. Under such circumstances

the Courts have applied estoppel principles and required the reinstatement, lack of eligibility notwithstanding.

That is not the case here however. Appellant was eligible for leave; she sought such leave and it was granted. Appellant's leave was expressly granted under the MPLA, not under the FMLA, and it was expressly extended to December 1, 2008. Unlike the FMLA, the state statute expressly provides for the extension of leave. Appellant was not ineligible for the leave and Respondent granted it to her. In cases where the employee was in fact eligible for the leave and a leave was extended, but reinstatement was not allowed, such claims constitute interference *per se*.

For example, Fry v. First Fidelity Bank Corporation, 1996 WL 36910 (E.D.Pa. 1996), involved an employee who took a sixteen-week leave "based, she claimed, on the employer's failure to notify her that this leave would not be protected under the FMLA and on misleading notifications in the employee handbook". Kosakow, 274 F.3rd at 724, citing Fry, *supra*. The Court "held that an employer's failure to post the required notices, in and of itself, can give rise to a claim of "interference with an employee's FMLA rights" where such failure causes the employee to "unwittingly forfeit the protections of the FMLA". Id. "In other words, Fry stands for the proposition that, under the proper circumstances, a distinct cause of action lies for an employer's failure to post a notice where the failure leads to some injury." Id.

Here, Respondent has acknowledged that it extended Appellant's leave to December 1, 2008, and at no time did it inform Appellant that, despite the extension of her leave, Respondent had not extended her right of reinstatement. The refusal to

reinstate her is *per se* an interference violation, and Respondent is estopped from contending that Appellant did not have such right.

E. The Court Errs in Its Finding That Appellant Did Not Claim Retaliatory Discharge in Violation of the MPLA.

In addition to providing for reinstatement after leave, the MPLA sets forth as follows:

Subd. 3.No employer retribution.

An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section.

Minn. Stat. § 181.941, subd. 3.

In her Amended Complaint, Appellant alleges in relevant part as follows under Count II (Violation of Parenting Leave Act):

34. The Minnesota Parenting Leave Act, Minn. Stat. § 181.941, mandates that an employee be granted a leave of absence in connection with the birth of a child.

35. An employee returning from such leave is entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours and pay.

36. Upon her return from leave, Plaintiff was not returned to her former position or a comparable position. Instead, she was returned to work for one day, allowed to perform no duties during that day, and then terminated the following day under the pretext that her position had been eliminated.

37. Defendant's actions above violates the Minnesota Parenting Leave Act.

38. Defendant's actions above have caused Plaintiff emotional distress, humiliation, embarrassment, pain and suffering, loss of wages and benefits, has incurred attorneys' fees, and has suffered other serious damages.

(AA-155). Appellant's Amended Complaint could not be more straightforward with respect to its allegations under the MHRA, including retaliatory discharge, and is sufficient to meet this state's requirements of notice pleading. See e.g., Swenson v. Holsten, 783 N.W.2d 580 (Minn. Ct. App. 2010) (citing Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co., 759 N.W.2d 651, 660 (Minn. Ct. App. 2009) (stating that Minnesota is a notice-pleading state, requiring only "information sufficient to fairly notify the opposing party of the claim against it"), review denied (Minn. Apr. 21, 2009)).

Appellant's Amended Complaint was sufficient to put Respondent on notice that she sought relief under the MPLA for both Respondent's failure to reinstate her and for retaliating against her by discharging her a day-and-a-half after her return from maternity leave. The Court erred in determining that a retaliatory discharge claim was not before the Court. (AA-19, n.11.)

Appellant contends that Respondent's dismissal of her on December 2, 2008, was precisely such retaliation. The Supreme Court of Minnesota has found that retaliatory discharge claims are to be determined according to the three-part burden-shifting test found in McDonnell-Douglas, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and applied in generally in Title VII suits. Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983) (citing Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir.1980); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir.1980), cert. denied, 450 U.S. 979, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981)).

The Hubbard Court determined that “[i]n order to establish a prima facie case where an alleged retaliatory discharge is involved, an employee must establish: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two. (Id.) As the uncontroverted record in this case demonstrates, Appellant engaged in statutorily protected conduct: she requested maternity leave from Respondent. Further, Appellant clearly suffered adverse action from her employer in the form of her termination one day after her return from maternity leave on December 1, 2008. Finally, Appellant has alleged and contends that her termination occurred as a result of her having sought and obtained maternity leave.

As discussed in detail below in Section II with respect to Appellant’s claims of sex discrimination, the Court has erred in finding that Respondent established, as a matter of law, a legitimate, non-pretextual reason for Appellant’s termination. As is set out below, Appellant presented evidence of overt comments from Respondent about not hiring employees “because she is pregnant” or firing employees quickly “before she becomes pregnant.” A jury should have been allowed to determine whether the termination of the Appellant 12 hours upon her return from leave constitutes retaliation.

In Podkovich v. Glazer’s Distributors of Iowa, Inc., 446 F.Supp.2d 982 (N.D.Iowa 2006), the court noted that although not always dispositive, “the time lapse between an employee’s protected activity and the employer’s adverse action is an important factor when evaluating whether a causal connection has been established.” 446 F.Supp 2d at 1008-09. The Podkovich Court found that, in the case of an employee’s termination four (4) days after her return from FMLA leave, “a reasonable juror could conclude from such

very close temporal proximity that [the employer] was simply waiting for the expiration of Podkovich's FMLA leave to terminate her in retaliation for taking FMLA leave."⁷ Id.; see also Stallings v. Hussmann Corp., 447 F.3d 1041, 1051 (8th Cir.2006) (finding that, in a case in which a plaintiff takes the full twelve-week benefit assured by the FMLA but is subsequently terminated upon her return, that plaintiff's claim is "a claim for retaliation and should be analyzed as such.")

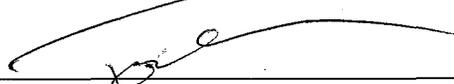
For the reasons set forth below, Appellant has created genuine issues of material fact as to whether or not Respondent was in fact engaged in a reduction in force during Appellant's MPLA leave and upon her return from leave and whether such assertion is merely pretextual.

CONCLUSION

The District Court erred in finding there is no genuine issue of material fact. Consequently, Appellant Kim Hansen respectfully requests that the Court of Appeals reverse and remands the judgment of the District Court.

Dated: 10/4/10

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⁷Interestingly, Marilyn Bird, during her deposition, refused to answer a question put to her concerning whether or not she had relied on the advice of legal counsel with respect to the decision to terminate Hansen *one day* after she returned from her FMLA leave. (*Bird depo.*, 122:7-125:4.)