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NO. A04-2493

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State of Minnesota  
**In Court of Appeals**

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Gregory A. Kvidera,

*Respondent,*

vs.

Rotation Engineering and Manufacturing Co.,

*Appellant.*

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**APPELLANT'S BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

**1. Did the district court err in construing an employment contract as terminable for just cause when the contract provided a one-year compensation agreement and was silent as to termination?**

The district court construed the employment contract as terminable for cause, denied summary judgment, and submitted the breach of contract claim to the jury.

### **Apposite authorities:**

*Martens v. Minn. Mining & Mfg. Co.*,  
616 N.W.2d 732 (Minn. 2000).

*Rognlien v. Carter*,  
443 N.W.2d 217 (Minn. Ct. App. 1989).

*Harris v. Mardan Bus. Sys. Inc.*,  
421 N.W.2d 350, 354 (Minn. Ct. App. 1988).

*Feeney v. Marine Midland Banks, Inc.*,  
579 N.Y.S.2d 670 (N.Y. App. Div. 1992).

**2. Did the district court err in awarding statutory penalties under Minn. Stat. § 181.13 for an employer's refusal to pay a bonus when the employer had paid the employee's salary and the statute provides penalties only for failure to pay "wages or commissions actually earned and unpaid at the time of discharge upon demand of the employee"?**

The district court awarded an employee statutory penalties under Minn. Stat. § 181.13 for an employer's refusal to pay a bonus.

### **Apposite authorities:**

Minn. Stat. § 181.13.

*Cole v. Holland Neway Int'l, Inc.*,  
No. A03-609, 2004 WL 503751 (Minn. Ct. App. March 16, 2004)  
(unpublished).

*Ward v. Tenneco Oil Co.*,  
564 So.2d 814 (La. Ct. App. 1990).

**3. Did the district court err in awarding attorney's fees under Minn. Stat. § 181.171, subd. 3, for prosecution of an employee's breach of contract claim when the statute provides attorney's fees only for failure to pay wages and commissions actually earned and unpaid at the time of discharge?**

The district court did not allocate attorney's fees between the employee's claims for breach of contract and statutory penalties. Rather, the court awarded fees incurred for prosecution of both claims.

**Apposite authorities:**

Minn. Stat. § 181.171.

*Orman v. Farmer Bros. Co.*,  
396 N.W.2d 924 (Minn. Ct. App. 1986).

## STATEMENT OF CASE

After Appellant Rotation Engineering and Manufacturing ("Rotation") terminated Respondent Gregory Kvidera, he filed this action alleging breach of contract and breach of Minn. Stat. § 181.13. (A. 1-7.)<sup>1</sup> Rotation denied Kvidera's claims and filed counterclaims alleging breach of fiduciary duty, conversion, and intentional misrepresentation. (A. 8-14.)

Rotation sought summary judgment on the grounds that Kvidera was an at will employee, and therefore terminable at any time. (A. 15-16.) On February 26, 2004, the Hennepin County District Court, the Honorable Richard S. Scherer presiding, denied Rotation's motion for summary judgment. (A. 88-98.) The district court decided that, while it was undisputed Kvidera began as an at will employee of Rotation, he later entered into two agreements that provided compensation for specified terms. (A. 89.) The district court concluded Rotation must prove it terminated Kvidera for good cause. (A. 89; A. 97.)

The case was tried to a jury from May 3, 2004 to May 7, 2004. The jury found Rotation breached its contracts with Kvidera by terminating him without cause; the jury also denied Rotation's counterclaims. (A. 107-08; A. 113-18.) The jury awarded Kvidera over \$90,000 in damages. (A. 108.) Kvidera moved for attorney's fees and civil penalties, which Rotation opposed. (A. 99-106.) On August 3, 2004, the district court awarded Kvidera attorney's fees and civil penalties under Minn. Stat. § 181.13. (A. 108-

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<sup>1</sup> Materials found in Appellant's Appendix are cited as "A. \_\_\_." The trial transcript will be cited as "T. \_\_\_."

09.) On September 3, 2004, judgment was entered in favor of Kvidera in the amount of \$159,154.87. (See A. 110-11.) Rotation filed a Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Amended Judgment. (A. 119-20.) The district court denied Rotation's motion on October 28, 2004. (A. 147-49.) This appeal followed.

## STATEMENT OF FACTS

Rotation Engineering and Manufacturing Company is a metal manufacturing company that stamps metal parts from sheets. James Lorence, Sr., is the sole owner and formally organized Rotation in 1975, but the business began in his garage where he worked at night after working all day for another company in the tool and die business. (T. 582-84.) His children were his first employees. (T. 584.) Now located in Brooklyn Park, Minnesota, the company has thirty employees and its building is 38,000 square feet. (T. 585-86.)

By 1999, Lorence was "burned out" and "wanted to hire someone to take over." (T. 586.) Although he had hired general managers in the past, this time he sought to spend less time at Rotation and turn over more responsibility. (T. 586.) Lorence's first effort to hire a firm to manage Rotation did not work and the firm was terminated after six to seven months. (T. 587.)

Lorence knew Greg Kvidera from their mutual membership in "Paradigm," a group of presidents in the metal manufacturing industry. (T. 588-89.) In March 2001, Kvidera was out of work and Lorence asked him to work at Rotation. (T. 589; T. 72.)

### **A. Kvidera's Employment At Rotation**

Rotation hired Kvidera as its general manager in March 2001. (T. 589; T. 73-74.) At the time, Kvidera did not have a written contract but signed Rotation's employment handbook, which provided he was an at will employee. (T. 73-74; A.85.) Kvidera reported to Lorence. (T. 75.)

Three months later, Kvidera became president of the company. In July 2001, he and Lorence signed an agreement, titled "Employment Contract," that described only the following terms of employment: Kvidera's title and compensation, including salary, bonus, and vacation. (A. 44.) The agreement also included the dates, "7-1-01 thru 6-30-02." (A. 44.) Kvidera's bonus was contingent on five elements. The agreement provided that Kvidera would receive a bonus based on Rotation's profitability, inventory, on-time delivery, quality rating based on parts shipped, and its customer service group. (A. 44.) The agreement was silent as to termination. (A. 44.)

On May 31, 2002, Kvidera and Lorence signed a second agreement, similar in terms to the first agreement,<sup>2</sup> but changing Kvidera's title to President/CEO and increasing his salary, insurance, bonus and vacation. (A. 45.) The second agreement stated, "Agreement runs through June 30, 2003." (A. 45.) The second agreement was also silent as to termination. (A. 45.)

Kvidera continued to report to Lorence as owner of the business. (T. 100.)

Lorence terminated Kvidera on September 9, 2002. (T. 593.) They did not discuss termination at the time. Kvidera testified, "At that point, I figured there's no discussion. You know, the owner's made his call." (T. 180.)

Rotation's attorney provided written reasons for termination in a letter to Kvidera. (Tr. Ex. 15.) The letter stated he was terminated because of loss of confidence, discrepancies in expense reports, and mismanagement of computer purchases. (*Id.* See

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<sup>2</sup> The second agreement added some new bonus criteria, e.g., cleanliness, and acquisition or "2 new" proprietary products. (A. 45.)

also T. 594.) Kvidera disputed these reasons and, at trial, testified that Rotation discharged him because Lorence's children, Debbie Cooper and James Lorence, Jr., did not want him to be president. (T. 182-83; *see also* T. 152-57; T 158-61; T 172-78.)

As discussed in the Statement of Case, Rotation moved for summary judgment, arguing that it was entitled to discharge Kvidera at will. (A. 15-16.) The motion was submitted on affidavits, including deposition testimony. (A. 17-87.) The district court rejected the motion and determined Rotation must establish good cause to terminate Kvidera. (A. 97.)

While the testimony at trial concentrated on evidence of cause for termination, breach of contract, and the statutory penalty issue, both Lorence and Kvidera testified consistent with the evidence submitted on summary judgment. Their testimony states that they signed two contracts that covered Kvidera's salary and bonus for fiscal years 2002 and 2003. (T. 589-90; T. 604-06; T. 620-21; T. 78-82; T. 136-43; T. 256-60; T. 288-89.)

## **B. Findings Of Fact And Conclusions Of Law**

The matter went to trial on May 3, 2004 and the jury returned a special verdict on several interrogatories including whether Rotation had good cause for termination and Rotation's counterclaims. On May 7, 2004, the jury found that Rotation lacked good cause for termination and breached its 2001 contract with Kvidera and awarded him \$16,368.00 in damages. (A. 113.) The jury also found that Rotation breached its 2002 contract with Kvidera and awarded him \$76,730.80 in damages. (A. 114.) The jury found against Rotation on its counterclaims, finding that Kvidera did not breach his duty

of loyalty, did not willfully interfere with and deprive Rotation of its use and possession of personal property and did not falsely represent past or present material facts to Rotation. (A. 114-15.)

In the district court's August 3, 2004, Findings of Fact, Conclusions of Law and Order for Judgment, the district court granted Kvidera's motion and found that he was entitled to a civil penalty under Minn. Stat. § 181.13 for unpaid wages in the amount of \$5,480.77 in statutory penalties. (A. 108.) The court also awarded Kvidera \$54,545.42 in attorney's fees under Minn. Stat. § 181.171, subd. 3. (A. 110.)<sup>3</sup>

On September 3, 2004, judgment was entered for Kvidera in the following amounts: \$93,098.80 for his breach of contract claims; \$5,480.77 in statutory penalties pursuant to Minn. Stat. § 181.13, and \$54,545.42 in attorney's fees pursuant to Minn. Stat. § 181.171, subd. 3. (A. 110.)

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<sup>3</sup> Additionally, the district court awarded Kvidera \$294.88 in statutory penalties pursuant to Minn. Stat. § 181.79 and \$5,735.00 in pre-judgment interest. (A. 110.)

## ARGUMENT

Greg Kvidera was terminated because, as Kvidera testified at trial, Rotation's owner, Jim Lorence, "made his call." (T. 180.) Lorence's prerogative is grounded in Minnesota's common law. It is undisputed that Kvidera began his employment at will. While he negotiated and signed later contracts detailing his compensation and bonus, the contracts are silent as to his termination. Minnesota case law is clear that contracts silent as to termination are terminable at will. References to salary or promises of bonuses are insufficient to transform an existing at will contract into a contract for a specified duration. These contracts only modified his initial employment agreement by providing for a bonus, but did not alter his status as an at will employee. Rotation was entitled to terminate Kvidera for any reason, or no reason at all. The district court erred in interpreting the contracts between the parties and the judgment in favor of Kvidera on breach of contract should be reversed and judgment entered in favor of Rotation.

Additionally, the judgment awarding statutory penalties under Minn. Stat. § 181.13 should be reversed. The statute does not authorize penalties for failure to pay a bonus, only for failure to pay wages and commissions. A careful review of statutory and case law indicates that wages and commissions should not be expansively construed to include bonuses. Accordingly, the district court's award of statutory penalties should be reversed.

The district court also incorrectly awarded Kvidera his attorney's fees by failing to allocate and award only those fees that related to the statutory claim. Kvidera is only

entitled to seek fees based on his statutory claim, not his common law breach of contract claim.

## **I. STANDARD OF REVIEW**

This Court reviews the district court's grant of summary judgment "to determine[e] whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999). Contract interpretation is a question of law which this Court reviews de novo. *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998). Statutory construction is also a question of law, which this Court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

"The standard of review for an appellate court examining an award of attorney fees and costs is whether the district court abused its discretion." *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904 (Minn. Ct. App. 1995) (citation omitted). Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this Court. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

## **II. THE DISTRICT COURT ERRED IN CONSTRUING KVIDERA'S EMPLOYMENT CONTRACT AS TERMINABLE FOR JUST CAUSE WHEN THE CONTRACT WAS SILENT AS TO TERMINATION**

When Kvidera was hired by Rotation, he signed an employee handbook that stated he was terminable at will. Later agreements about compensation and bonuses did not change this relationship. In June 2001, and again in May 2002, Rotation agreed to pay

Kvidera a specific annual salary and bonus, if the engineering company's performance met a certain standard over a specified period of time. The specific period of time related to computation of Kvidera's bonus—if he earned it—and did not promise Kvidera he would be employed for a certain duration.

The district court's construction of Kvidera's contracts turns established Minnesota case law on its head. Minnesota courts presume an employee is terminable at will unless there is a specific agreement to terminate "for cause." Here, Rotation's handbook specified at will termination and Kvidera signed it. The subsequent salary and bonus agreements were silent as to termination. The references to specific one-year periods in the bonus agreements did not result in an implicit agreement to terminate for cause. Case law from Minnesota and other jurisdictions establishes that mere references to timing of compensation and bonuses do not convert at will employment into employment terminable only for cause. The judgment in favor of Kvidera breach of contract should be reversed because Rotation was entitled to terminate him at will.

**A. Employee Termination Is Presumptively At The Will Of The Employer**

In Minnesota, employees are presumptively terminable at the will of the employer, for any reason or no reason at all. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn. 2000). Employment is considered "for cause" only under limited circumstances, including where the employer and employee have agreed to employment for a definite duration. *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769, 771 (Minn. Ct. App. 1987). Absent an express agreement regarding termination for cause, to

establish a "for cause" employment relationship, an employee must provide "clear and unequivocal language by the employer evidencing an intent to provide job security." *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 181-82 (Minn. Ct. App. 2001) (determining employer's statement that employee "would always be taken care of" was insufficient to overcome the "at will" presumption). However, "[e]mployment contracts which do not specify whether employment is terminable with or without cause are construed to be terminable at will." *Harris v. Mardan Bus. Sys. Inc.*, 421 N.W.2d 350, 354 (Minn. Ct. App. 1988).

In denying Rotation's motion for summary judgment, the district court determined that, while Kvidera began working at Rotation as an at will employee, his subsequent agreements with Rotation created employment terminable only for cause. (A. 89; A. 97.) The district court emphasized that the parties negotiated the agreements, labeled them "Employment Contract," and the agreements showed no intent by the parties that the specified dates refer only to Kvidera's bonus plan. (A. 96.)

In finding that Kvidera was terminable for cause and denying Rotation's motion for summary judgment, the district court erred. The law is clear that when an employment contract is silent as to termination, an employee is terminable at will. *See Martens*, 616 N.W.2d at 741. The Minnesota Supreme Court strictly applies this principle. In *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 326 (Minn. 2004), the supreme court concluded a listing agreement that did not contain a specific termination event or date was terminable at will. While the listing agreement included references to possible termination events, the court concluded that it was not clear the

references were intended to describe termination of the agreement because the references were incidental to other terms that did not deal with termination. *Id.*

Here, the parties' written agreements are silent regarding termination. Therefore, Kvidera was an at will employee. *See Harris*, 421 N.W.2d at 354 ("Employment contracts which do not specify whether employment is terminable with or without cause are construed to be terminable at will."). The dates included in the parties' agreements, and relied on by the district court, are incidental to other terms of the agreement that do not deal with termination. Such dates do not specifically refer to Kvidera's termination and thus are not definite enough to alter Kvidera's at will status. *See Rosenberg*, 685 N.W.2d at 326.

Additionally, the district court erred in assuming the parties had modified Kvidera's at will termination. When parties consent to modify an agreement, the contract "consists thereafter of the new terms and of all of the old ones which were not changed." *First Nat'l Bank of Moorhead v. St. Anthony & Dakota Elevator Co.*, 171 Minn. 461, 465, 214 N.W. 288, 289 (1927). A new contract does not modify the entirety of an old contract; "the remaining provisions of the agreement remain in force." *Lapadat v. Clapp-Thomssen Co.*, 397 N.W.2d 606, 608 (Minn. Ct. App. 1986).

Neither party disputes that Kvidera was hired as an at will employee. Kvidera's 2002 and 2003 agreements did not contain all of his employment terms. These later agreements changed his job title, salary, bonus, and vacation package, but never added a provision regarding termination. Therefore, they merely modified the compensation

terms of his initial employment contract—the employment handbook—that stated he was terminable at will.

The district court erred in construing the contract between Rotation and Kvidera. The bonus contracts are silent as to termination; therefore, Kvidera's employment was terminable at will. Moreover, the contracts only specify and modify compensation terms for Kvidera's employment. Because it is undisputed that Kvidera began as an at will employee and the bonus contracts did not change this relationship, Kvidera's employment was terminable at will.

**B. Agreements Regarding Compensation Are Insufficient To Create Employment Terminable For Cause**

An express agreement regarding compensation does not create a contract for a specified duration. *Rognlien v. Carter*, 443 N.W.2d 217, 220 (Minn. Ct. App. 1989) (stating that a reference to an annual salary structure is alone insufficient to create an employment contract); *Harris*, 421 N.W.2d at 354 (holding that the right to purchase stock over a five-year period does not imply a right to employment for the same period). Additionally, by stipulating to an employee's pay in terms of a weekly, monthly or annual period, an employer does not create the presumption of employment for the period named. *See, e.g., Mann v. Ben Tire Distribs., Ltd.*, 411 N.E.2d 1235, 1237 (Ill. App. Ct. 1980) (holding dates in agreement that established bonus calculated on annual basis determined only whether bonus was due and did not provide for one-year contract); *Kovachik v. Am. Auto. Ass'n*, 92 N.W.2d 254, 255 (Wis. 1958) (holding contract that

provided weekly compensation but specified no term of employment was terminable at will).<sup>4</sup>

In denying Rotation's motion for summary judgment, the district court mistakenly rejected *Rognlien*, 443 N.W.2d 217, finding the case materially and factually different from the present circumstances. (A. 95-96.) Rognlien was hired by his employer based on an oral agreement. *Id.* at 218. Following a meeting, the employer wrote Rognlien a letter stating he would be paid a salary on an annual basis. *Id.* at 219. When he began work, he was given an employee handbook stating he was terminable at will. *Id.* Six weeks after starting work he was terminated. *Id.*

This Court determined that Rognlien had an oral employment contract, but because the contract was silent regarding termination, he was an at will employee who could be terminated without cause. *Id.* Considering whether the employer's letter was sufficiently definite such that the employee could be terminated only for cause, this Court held that "the letter's reference to an annual salary structure is alone insufficient to create a contract, and the handbook specifically states that [the employer] could 'terminate the employment of any employee at any time.'" *Id.* at 220.

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<sup>4</sup> The majority of jurisdictions have adopted the modern rule stating that, standing alone, compensation in terms of a specific time period does not create a presumption that the parties intended the employment to be for the named period. *See* 93 A.L.R.3d 659. Other states, like Minnesota, also recognize this rule but may consider the reference to compensation with other relevant circumstances. *Id.* *See Bryngelson v. Minn. Valley Breeders Ass'n*, 262 Minn. 275, 114 N.W.2d 748 (1962); *Fountain v. Oreck's*, 245 Minn. 202, 71 N.W.2d 646 (1955).

*Rognlien* may not be distinguished from this case because Kvidera and Rotation had written employment contracts. *Rognlien's* letter similarly referenced an "annual" salary. More importantly, the existence of a contract is not disputed in either *Rognlien* or the pending case. The issue in both cases is whether the parties agreed to specific terms establishing termination only for cause. *Rognlien*, therefore, is not as factually different as the district court concluded and its differences are not material.

Both *Rognlien* and Kvidera received an employment handbook stating they were terminable at will, thereby beginning their employment at will. Both parties rely on documents referencing salary to argue they were terminable only for cause, but both parties' documents are silent as to termination and the duration of their employment. *Rognlien* held that where an employer has the right to terminate an employee without cause, an agreement regarding the structure of the employee's compensation will not create a contract for a specified duration. The outcome should be the same here, and therefore, the district court erred by concluding that Kvidera was terminable only for cause.

Consistent with Minnesota case law holding that an agreement to an annual salary does not create a contract for a specific duration, other courts have held that an employer's promise to pay a bonus at a specific time does not create a contract for a specific duration. In *Feeney v. Marine Midland Banks, Inc.*, 579 N.Y.S.2d 670 (N.Y. App. Div. 1992), the district court granted the employer's motion for summary judgment concluding that the employee was terminable at will. On appeal, the appellate court affirmed, rejecting the employee's argument that a letter from her employer limited the

employer's right to terminate her. *Id.* at 672. The court found that the employee had been provided with an employee handbook stating her employment was at will and concluded that "[t]he letter . . . does not provide a guaranteed term or limitation on the right to discharge, and its reference to a bonus payable in January 1984 is not a guarantee of employment for a minimum duration." *Id.*

Further, the Georgia Court of Appeals in *Hanne v. Miss. Mgmt., Inc.*, 564 S.E.2d 557, 558 (Ga. Ct. App. 2002), affirmed the district court's grant of summary judgment in favor of the employer. In *Hanne*, the employee also relied on a letter agreement between the parties setting out various terms of his employment, including the possibility of a bonus. *Id.* at 557. The court based its decision, in part, on the principle that "[a]n employment contract containing no definite term of employment is terminable at the will of either party." *Id.* at 558. The court held that the written agreement stating the employee was to receive a \$4,000 bonus if he stayed with the company for two years did not establish a definite two-year term of employment. *Id.* at 557

Like the employees in *Feeney* and *Hanne*, Kvidera began his employment at will. Similar to the agreements in *Feeney* and *Hanne*, Kvidera's contracts contained no "for cause" provisions. The dates included in his bonus agreements were not specific to his duration of employment or termination, and therefore, the contracts did not alter Kvidera's status as an at will employee. As a result, Rotation was entitled to summary judgment and the district court erred.

### III. **ADDITIONALLY, THE DISTRICT COURT ERRED IN APPLYING STATUTORY PENALTIES PURSUANT TO MINN. STAT. § 181.13 FOR ROTATION'S FAILURE TO PAY KVIDERA'S BONUS**

The parties agree that Rotation paid Kvidera the salary to which he was entitled under his 2001 contract. The issue is whether Rotation should be penalized under Minn. Stat. § 181.13 for failing to pay Kvidera the bonus he claimed based on the 2001 contract. The district court erred in awarding statutory penalties because Minn. Stat. § 181.13 does not apply to unpaid bonuses, only unpaid wages and commissions. While neither statute nor case law define “wages” or “commissions,” a plain reading of the statute indicates that it covers only employment terms by the day, hour, week or month. Bonuses are not calculated by the day, hour, week, or month, and therefore, are not covered by the statute.

#### A. **Minn. Stat. § 181.13 Provides That An Employer May Be Penalized For Unpaid Wages And Commissions**

Minn. Stat. § 181.13(a) provides that:

When any employer employing labor within this state discharges an employee, the *wages or commissions actually earned* and unpaid at the time of the discharge are immediately due and payable upon demand of the employee. If the employee's earned wages and commissions are not paid within 24 hours after demand, *whether the employment was by the day, hour, week, month or piece or by commissions*, the employer is in default. The discharged employee may charge and collect the amount of the employee's average daily earnings at the rate agreed upon in the contract of employment, for each day up to 15 days, that the employer is in default, until full payment or other settlement, satisfactory to the discharged employee, is made.

(Emphasis added.) (A. 156-57.) Minn. Stat. § 181.13 is penal in nature. *See Hansen v. Remer*, 160 Minn. 453, 462, 200 N.W.2d 839, 843 (1924) (stating purpose of the statute

is to "penalize employers who fail to pay their employees' wages promptly"). Therefore, it should be strictly construed. *Chatfield v. Henderson*, 252 Minn. 404, 410, 90 N.W.2d 227, 232 (1958).

Kvidera sought penalties pursuant to Minn. Stat. § 181.13 for Rotation's failure to pay his bonus. (A. 107-18.) The district court erroneously concluded that Kvidera's bonus was a wage or commission under Minn. Stat. § 181.13 and awarded Kvidera \$5,480.77 in statutory penalties, his average daily earnings for 15 days after his demand went unfulfilled. (A. 108.)

**B. The District Court Erred In Applying Statutory Penalties Under Minn. Stat. § 181.13 Because A Bonus Is Not A Wage Or Commission**

Minn. Stat. § 181.13 does not define "wages" or "commissions." Statutes are to be construed to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. In doing so, effect must be given to the plain meaning of statutory terms. Minn. Stat. § 645.08. Whenever possible, when interpreting a statute, no word, phrase or sentence should be deemed superfluous, void, or insignificant. *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003).

Minnesota case law is unclear regarding how to construe "wages" and "commissions" under Minn. Stat. § 181.13. This Court has previously characterized a bonus as a "wage supplement" governed by Minn. Stat. § 181.74, rather than by

Minn. Stat. § 181.13.<sup>5</sup> *Maida v. Maxi-Switch Co.*, No. C0-88-1344, 1989 WL 452, at \*3 (Minn. Ct. App. Jan.10, 1989) (unpublished). (A. 153-55.)

Unfortunately, two other decisions that discuss Minn. Stat. § 181.13 do not resolve whether the statute applies to unpaid bonuses. In *Anderson v. Medtronic, Inc.*, 382 N.W.2d 512, 513 (Minn. 1986), an employee sought and received penalties under Minn. Stat. § 181.13 for its employer's failure to pay an incentive bonus upon the employee's discharge. The issue on appeal, however, was whether the district court erred in submitting to the jury the issue of the employer's bad faith in failing to pay the discharged employee's wages, not whether Minn. Stat. § 181.13 was the proper vehicle to seek penalties for an unpaid bonus. Therefore, *Anderson* does not clarify the issue in this case. The Court of Appeals in *Cole v. Holland Neway Int'l, Inc.*, No. A03-609, 2004 WL 503751, at \*3 (Minn. Ct. App. Mar. 16, 2004) (unpublished) (A. 150-52), also discusses Minn. Stat. § 181.13, but only holds that it does not apply to unpaid severance pay.

A proper reading of Minn. Stat. § 181.13, however, indicates that bonuses should not be included. First, only wages or commissions *actually earned* at the time of discharge are due and payable upon the employee's demand. On this point, this Court's analysis in *Cole* is instructive. In *Cole*, 2004 WL 503751, at \*1, an employee sued his

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<sup>5</sup> Minn. Stat. § 181.74, subd. 1, provides that:

Any employer required under the provisions of an agreement to which the employee is a party to pay or provide benefits or wage supplements to employees . . . and who refuses to pay . . . such supplements within 60 days after such payments are required to be made under law or under agreement, is guilty of a gross misdemeanor. (A. 158-60).

former employer, alleging the employer breached his contract by refusing to pay him severance benefits upon his discharge and therefore he was entitled to costs and attorney's fees under Minn. Stat. § 181.13. This Court reasoned that, although severance pay is considered income for the purpose of some statutes, employees are not entitled to use severance benefits at any time they wish. *Id.* at \*3. Employees do not receive severance benefits until termination; therefore, the benefit is not truly "owing" until the employee is terminated. *Id.* Based on this analysis, the Court concluded that Minn. Stat. § 181.13 does not encompass severance pay. *Id.*

Similar to the severance benefits that fall outside Minn. Stat. § 181.13, bonuses may not actually be earned at the time of an employee's discharge. Bonuses are often calculated at infrequent intervals and may be dependent on certain events occurring. A bonus, therefore, may not be earned until a certain time, until a certain event occurs, or until certain calculations are made. For example, in this case, the bonus was calculated only at specific intervals and was dependent on subjective and objective criteria determining company performance; it did not turn on Kvidera's individual performance. (A. 44-45.) Therefore, any bonus was neither earned nor immediately owing upon Kvidera's discharge.

Additionally, Minn. Stat. § 181.13 includes the language "whether the employment was by the day, hour, week, month, or piece or by commissions." This language evidences the legislature's intent to regulate terms of employment that are by the day, hour, week, etc. Generally, bonuses are not determined by the day, hour, week, or month. Here, the bonus was certainly not determined by the day, hour, week, or

month and was not even tied to Kvidera's individual performance. Rather, Kvidera's bonus was based on the company's performance, as determined by several indicators, such as profitability, on-time delivery, customer service group, inventory and quality rating based on parts shipped. (A. 44-45.)

Other courts addressing this issue have used similar reasoning to conclude that a bonus is not a wage for purposes of a wage penalty statute. Louisiana's wage penalty statute is similar to Minnesota's in that it provides for penalties whether the employment is by the day, hour, week, or month. *See* La. Rev. Stat. Ann. § 23:631(A)(1)(a) (West 2004). (A. 163-65.) In *Ward v. Tenneco Oil Co.*, 564 So. 2d 814, 820 (La. Ct. App. 1990), the court of appeals first recognized that the wage penalty statute is penal in nature and must be strictly construed. The court then examined the nature of the bonus in question, which depended on the employee staying with the company for a specified amount of time before the company was sold. *Id.* The court determined that the employee could leave the company at any time and would have no claim to the bonus, and therefore, the bonus payment was not by the "day, hour, week, or month." *Id.* The court held that the employer therefore did not violate the wage penalty statute when it withheld payment of the bonus. *Id.*

Although Kvidera's bonus did not depend on his remaining with Rotation for a certain length of time, it did require a certain amount of time to pass for particular calculations to be made. As in *Ward*, Kvidera's bonus was not "by the day, hour, week, month, or piece" and he is not entitled to penalties under Minn. Stat. § 181.13. The district court's judgment awarding penalties should be reversed.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING KVIDERA ATTORNEY'S FEES FOR BOTH HIS COMMON LAW AND STATUTORY CLAIMS**

Minn. Stat. § 181.171, subd. 3, only allows an award of attorney's fees where the employer has violated specific Minnesota statutes. The district court erred in awarding Kvidera attorney's fees without allocating the fees between his statutory and common law claims. Kvidera is only entitled to claim attorney's fees for his statutory claim.

##### **A. The District Court Has Discretion To Award Reasonable Attorney's Fees For Minn. Stat. § 181.13 Claims**

Minn. Stat. § 181.171, subd. 1, allows an individual to bring a civil action seeking redress for an employer's violation of Minn. Stat. § 181.13. The court "shall order an employer who is found to have committed a violation [of Minn. Stat. § 181.13] to pay to the aggrieved party reasonable costs, disbursements, witness fees, and attorney fees." Minn. Stat. § 181.171, subd. 3. Based on the record and applicable statute, Kvidera was only entitled to attorney's fees if the district court determined that Rotation violated Minn. Stat. § 181.13.

##### **B. The District Court Erred In Awarding Attorney's Fees Without Allocating Between Kvidera's Statutory And Common Law Claims**

In this case, Kvidera prevailed on two different claims: breach of contract and failure to pay wages under Minn. Stat. § 181.13. In awarding attorney's fees, the district court did not allocate Kvidera's attorney's fees between Kvidera's different claims, but

instead awarded Kvidera his entire attorney's fees, after minor deductions.<sup>6</sup> (A 109-11; *see also* A 99-106.)

Recovery of attorney's fees must be based on either statute or contract. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). There was no agreement, however, between Rotation and Kvidera allowing for attorney's fees for a party's common law claims. Nor does any statute provide a basis for Kvidera to seek attorney's fees for his breach of contract claim. Minn. Stat. § 181.171 provides only for attorney's fees for a Minn. Stat. § 181.13 claim. Therefore, Kvidera was not entitled to attorney's fees for his breach of contract claim.

This Court should remand the case, instructing the district court to allocate attorney's fees for Kvidera's statutory claims. In *Orman v. Farmer Bros. Co.*, 396 N.W.2d 924, 926 (Minn. Ct. App. 1986), the employee sued his employer in connection with his wrongful discharge, and included a Fair Labor Standards Act ("FLSA") claim for unpaid overtime. The FLSA claim provided for statutory attorney's fees. *Id.* The employee was awarded a total of \$7,686.03, including \$528.75 in unpaid overtime, but the district court failed to award the employee any attorney's fees. *Id.* This Court noted that while the overtime claim was "only one of several claims," the employee requested attorney's fees and costs for the entire action. *Id.* at 927. It therefore remanded the case to the district court "for a determination of reasonable attorney's fees and costs *allocable to the overtime claim.*" *Id.* (emphasis added).

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<sup>6</sup> The district court declined attorney's fees for a second attorney at trial. (A. 109.)

Other jurisdictions have expressly held that when a party prevails on an action that encompasses both a claim for which attorney's fees are authorized and a claim for which they are not, the court must apportion the fees incurred for each claim. *See Rockledge Mall Assocs. Ltd. v. Custom Fences of Brevard, Inc.*, 779 So. 2d 558, 559 (Fla. Dist. Ct. App. 2001) ("[T]he party seeking attorney's fees on multiple claims, one of which is a claim based on a written contract, has an affirmative burden to demonstrate what portion of the effort was expended on the claim which allowed attorney's fees."); *Bennett v. Baugh*, 990 P.2d 917, 921 (Or. Ct. App. 1999) ("When a party prevails on an action that encompasses both a claim for which attorney fees are authorized and a claim for which they are not, the court must apportion the fees incurred for each claim.").

The district court erred in awarding Kvidera all of his attorney's fees. There is no statutory or contractual basis to support an award of attorney's fees for Kvidera's breach of contract claim, therefore, the district court should have allocated Kvidera's requested fees between his Minn. Stat. § 181.13 claim and his breach of contract claim. This Court should remand to the district court with instructions to allocate attorney's fees between the breach of contract and statutory claims.

### **CONCLUSION**

Kvidera began his employment with Rotation as an at will employee. Kvidera even signed an employee handbook stating he was terminable at will. Nothing during his employment changed this arrangement. The only written agreements between the parties provided for Kvidera's salary, vacation time, and bonus, but the agreements were silent as to termination. The district court erred in interpreting the dates in these agreements as

creating a "for cause" relationship. Existing case law is clear that references to compensation periods and promises of bonuses do not alter an employee's at will status. The district court should have granted Rotation's motion for summary judgment. The judgment favorable to Kvidera on breach of contract should be reversed and entered in favor of Rotation.

Additionally, the district court's awards for statutory penalties and attorney's fees must be reversed. Minn. Stat. § 181.13 does not allow penalties for an employer's failure to pay a bonus. Further, the district court abused its discretion in awarding attorney's fees to Kvidera without allocating attorney's fees to only his statutory claim. Based on statutory language and precedent, the district court should have allocated the fees between the statutory and common law claims, awarding only fees for the statutory claim. As a result, Rotation respectfully requests that this Court reverse the judgment for statutory penalties and attorney's fees and remand with instructions.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).