

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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**RESPONDENT'S BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

- 1. Whether the district court was correct in concluding that the one-year employment agreement was not at-will and was terminable only for cause.**

The district court found that the parties' employment agreement was for a specific duration and, thus, terminable only for cause.

Most Apposite Authorities:

Aberman v. Malden Hills Indus., Inc., 414 N.W.2d 769 (Minn. Ct. App. 1987).  
Thomsen v. Independent School District No. 91, 244 N.W.2d 282 (Minn. 1976).  
Pine River State Bank v. Mettillie, 333 N.W.2d 622 (Minn. 1983).

- 2. Whether the district court was correct in concluding that a non-discretionary bonus is a "wage" subject to Minn. Stat. § 181.13.**

The district court held that the earned unpaid non-discretionary bonus was subject to Minn. Stat. § 181.13.

Most Apposite Authorities:

Minn. Stat. § 181.13.  
Anderson v. Medtronic, Inc., 382 N.W.2d 512 (Minn. 1986)  
Brown v. Tonka Corp., 519 N.W.2d 474 (Minn. Ct. App. 1994)  
Minn. Stat. § 268.035, Subd. 29.  
Minn. Stat. § 541.07, Subd. 5.

- 3. Whether the district court abused its discretion in determining reasonable attorney fees necessarily expended by plaintiff to prevail under Minn. Stat. § 181.13.**

The district court determined a reasonable amount of attorney fees based upon the specific facts of the underlying case.

Most Apposite Authorities:

Minn. Stat. § 181.13.  
Minn. Stat. § 181.171.  
Schultz v. Maverick Construction Co., 1999 WL 243447 (Minn. Ct. App. 1999)(unpublished).

## STATEMENT OF THE CASE

This appeal arises from the decisions of the trial court on a pre-trial motion for summary judgment and a post-trial motion for attorney fees and costs. On February 26, 2004, the trial court issued its order on the summary judgment matter finding that Kvidera was employed under contract for a specified term, and, thus, good cause was required for termination. (Appellant's Appendix ("AA") at p. 88) The trial court noted:

Each document was labeled an "employment contract," not a "bonus contract." Each document also sets forth a variety of terms of which the bonus plan is but one. In the first contract, the bonus plan is listed last while the contract's term is listed immediately below Kvidera's title ... The layout of the contracts manifest no intent by the parties that the specified terms reference only the period of the bonus plan. Lorence's protestations ... cannot save him from his conscious decision to sign the documents with the term "employment contract" right at the top. If Lorence did not intend to enter into an employment contract he should have opted against signing the contracts.

After prevailing at trial, plaintiff Kvidera brought a motion for penalties, costs and attorney fees. On August 3, 2004, the trial court found that plaintiff Kvidera was entitled to a civil penalty under Minn. Stat. § 181.13 for unpaid wages, including reasonable attorney fees in the amount of \$51,144.00. (AA. 107) The trial court determined:

Rotation left Kvidera no option but to litigate his claims to receive damages ... Rotation offered no settlement that involved payment or partial payment of the damages claimed by Kvidera. Rather, Rotation pursued counterclaims against Kvidera for breach of duty of loyalty, conversion, and false representations.

By order dated October 28, 2004, the trial court denied Rotation's motion for judgment notwithstanding the verdict, new trial, and/or amended judgment.

## STATEMENT OF FACTS

### **A. Rotation and Kvidera Entered Into Employment Contracts For Definite Durations.**

Rotation Engineering & Manufacturing Co.'s owner James Lorence wanted to hire Respondent Gregory Kvidera to help the struggling metal manufacturing company. (Trial Transcript ("T") at p. 81-144) After three months working as a general manager, Kvidera was promoted and agreed to become Rotation's President. (T. 78-80) Lorence entered into an employment contract with Kvidera that covered a specific one-year period starting on July 1, 2001 (hereinafter referred to as "2001 Employment Contract"). (Respondent's Appendix ("RA") at p. 6) The document was labeled "Employment Contract" and set forth a variety of terms and was signed by Lorence and Kvidera. Kvidera understood the contract to be binding for the specific duration of time, and he also received additional consideration and bonus incentives to help the struggling company. (RA. 3, 6)

As the 2001 Employment Contract was approaching expiration, Lorence and Kvidera wanted to enter into a second one-year contract. (T. 81-144, RA. 7) Lorence helped draft the agreement and agreed the contract accurately reflected his employment agreement with Kvidera. (RA. 3, 13) The document was labeled "Employment Contract Between Rotation Engineering and Gregory Kvidera" (hereinafter referred to as "2002 Employment contract"). (RA. 7) The 2002 Employment Contract included specific terms of (a) position, (b) duration of agreement, (c) salary, (d) vacation, (e) bonus criteria, as well as (f) company credit card, (g) expenses and (h) life insurance. (Id.) The

employment contract's term of duration is located immediately below the title, and specifically states the "Agreement runs through June 30, 2003." (Id.)

**B. Rotation Refused To Pay Compensation Earned Prior To Kvidera's Termination.**

Pursuant to the terms of the 2001 Employment Contract, Kvidera earned a specific non-discretionary bonus. The 2001 Employment Contract bonus terms were met and agreed by Lorence to be to be paid on August 1, 2002. (RA. 38) Lorence directed that his daughter Deb Cooper, the part-time book keeper at that time, work out the details and pay Kvidera's compensation which totaled just under \$17,000.00 (AA. 46-47, T. 428, Trial Exhibits 6, 7, 8) Kvidera, however, had concerns over the company's cash flow and decided to defer his earned bonus to a later date after the fiscal period. (T. 131-133) Rotation admitted that Kvidera's bonus was earned according to the terms included in his employment agreement prior to his termination. (T. 616-630, RA 38)

Rotation, however, never paid Kvidera his earned bonus. Rotation terminated Kvidera without explanation on September 9, 2002. (T. 427)

**C. Kvidera Was Terminated Due to Family Disputes.**

Approximately 6 days prior to Kvidera's termination, Cooper was extremely upset over criticism at a company meeting. (T. 161-181, Trial Exhibits 13, 14) Cooper refused to discuss the issue further with Kvidera, refused to do a cash flow analysis requested by Kvidera, and stated she was going to leave. (Id.) After the confrontation, Kvidera sent an email to Lorence summarizing and asking that Lorence let he and Cooper work out their

differences. (RA. 8) Lorence did not respond.

About the same time, Cooper also was also extremely upset over the manner that Kvidera gave away the company's tickets to the PGA tournament, and threw her pen across her office. (T. 157-161) Cooper was upset when Kvidera gave the tickets to another employee and not customers or herself. Cooper walked out of meeting and threw her pen across her office. (Id.) Another family dispute existed over Kvidera holding Lorence's son Jimmie, a company salesperson, accountable for "pulling his own weight" in sales, lying about his sales activities, and reporting to work with alcohol on his breath. (T. 149-157, Trial Exhibit 9)

Lorence terminated Kvidera and named his daughter president. (T. 237, 463, Trial Exhibit 21) Kvidera requested the reasons for termination pursuant to Minn. Stat. 181.233. Rotation responded that it was due to expense requests (which totaled \$140) and a computer issue. (T. 460; Exhibit 15, 16) Kvidera sent demands pursuant to Minnesota law for payment of his bonus and contract. (Id.)

**D. Kvidera Was Forced To Commence Suit and Prevail At Trial in Order To Make Any Recovery Of his Earned Compensation.**

Rotation refused to discuss any monies owed and Kvidera was forced to sue. Kvidera commenced suit on November 19, 2002, demanding payment under the employment contracts pursuant to Minn. Stat. § 181.13. (AA. 1) Rotation denied that it owed any compensation to Kvidera due to alleged breach of duty of loyalty, conversion, and false representations. (AA. 8) Rotation brought a summary judgment motion arguing

that Kvidera was not entitled to any bonus under the same theories. (RA. 39) Defendant argued that the employment contracts between Rotation and Kvidera actually were “bonus plans” and, thus, Kvidera was an “at-will” employee because the specified duration applied only to the bonus criteria. (RA. 41) The trial court stated that “Rotation’s assertion that the documents constitute, at best, contracts for mere ‘bonus plans’ is untenable.” (AA. 96)(emphasis added)

The parties proceeded to trial and Kvidera prevailed. Specifically, the jury found that Rotation lacked good cause to terminate Kvidera and that it failed to pay him the compensation earned and owed for the 2001 Employment Contract and the remainder of the 2002 Employment Contract. (AA. 113)

Kvidera brought a post-trial motion for penalties, costs and attorney fees with a supporting affidavit. (AA. 99) On August 3, 2004, the trial court found that plaintiff Kvidera was entitled to a civil penalty under Minn. Stat. § 181.13 for unpaid wages, including reasonable attorney fees in the amount of \$51,144.00. (AA. 107) The trial court noted that Kvidera was forced to litigate and proceed to trial to recovery any amounts under the earned bonus or second employment contract. (AA. 109)

## ARGUMENT

The trial court correctly determined that Kvidera was not at-will because he was under contract with Rotation for a specified duration. Minnesota law is clear that employment contracts for a specific duration are terminable only for cause. The jury found that Rotation lacked good cause to terminate Kvidera and that they failed to pay his earned bonus and remainder of the employment contract. After trial, the court correctly held that Rotation's failure to pay Kvidera's earned bonus was a violation of Minn. Stat. § 181.13. Under Minnesota law, vacation pay is considered a "wage" subject to the statute because it is wholly contractual and earned prior to termination. Similar to vacation pay, Kvidera's compensation was wholly contractual and earned prior to termination. In awarding attorney fees, the trial court examined the specific facts of the case and did not clearly err in determining the amount reasonably expended for Kvidera to recover under the statute. Finally, appellate attorney fees and costs should be awarded to Kvidera to uphold the statute's purpose.

### **I. STANDARD OF REVIEW**

The construction and effect of an unambiguous contract, including the present issue of whether the district court was correct in concluding that the one-year employment agreement was terminable only for cause, is a question of law which this Court reviews de novo. Wolfson v. City of St. Paul, 535 N.W.2d 384, 386 (Minn. App. 1995)(citing

Empire State Bank v. Devereaux, 402 N.W.2d 584, 587 (Minn. App. 1987)), review denied (Minn. Sept. 28, 1995).

Statutory construction, including the issue of whether the district court was correct in concluding that a non-discretionary bonus is a “wage” subject to Minn. Stat. § 181.13, is 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).

A trial court’s determination of attorney fees is a question of fact and should not be reversed unless clearly erroneous. Amerman v. Lakeland Dev. Corp., 203 N.W.2d 400, 401 (Minn. 1973). This standard applies to the issue of whether the district court clearly erred in determining the amount of reasonable attorney fees necessarily expended by plaintiff to prevail under Minn. Stat. § 181.13.

**II. THE DISTRICT COURT WAS CORRECT IN DETERMINING KVIDERA WAS NOT AT-WILL AND WAS TERMINABLE ONLY FOR CAUSE.**

The trial court was correct when it determined that Kvidera could be terminated only for cause. Kvidera’s original at-will status was modified when he entered into the employment contracts with Rotation because the agreements contained specific durations. While employment for an indefinite duration is said to be at-will, it is permissible for parties to modify an at-will employment relationship so as to create a specific duration or conditions for termination. Audette v. N.E. St. Bank of Minneapolis, 436 N.W.2d 125, 126 (Minn. Ct. App. 1989). An employer may enter into an oral or written contract guaranteeing to employ someone for a specific period of time. Pine River State Bank v.

Mettile, 333 N.W.2d 622, 630 (Minn. 1983). The Supreme Court concluded that job security provisions are "enforceable, whether they are proffered at the time of the original hiring, or later, when the parties have agreed to be bound thereby." Id. at 630.

Prior to Kvidera's termination, he and Rotation agreed to an employment contract explicitly extending through June 30, 2003. As the trial court noted, the document at issue was entitled "Employment Contract Between Rotation Engineering and Gregory Kvidera." The contract's term was specified immediately below the title, and specifically stated that the "Agreement runs through June 30, 2003." The agreement included specific terms of (a) position, (b) duration of agreement, (c) salary, (d) vacation, (e) bonus criteria, as well as (f) company credit card, (g) expenses and (h) life insurance. Additionally, the agreement promoted Kvidera to the position of CEO. Lorence was aware of the specific duration of Kvidera's employment as evidenced by his rush to sign Kvidera to the second employment contract before the first expired. Because Kvidera was under contract for a specified duration, he was not an at-will employee.

**A. Kvidera Could Only Be Terminated For Cause Because He Was Under an Employment Contract for a Specified Duration.**

Minnesota law is clear, and Rotation does not dispute, that employment contracts for a specific duration are terminable only for cause. Employment is considered for cause 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).

Under a contract for a specified duration, an employee may be terminated during the

period of the contract only upon a showing that the employer has good cause. Thomsen v. Independent School District No. 91, 244 N.W.2d 282 (Minn. 1976). As stated above, Kvidera was terminated during the term of his second employment contract with Rotation. The employment contract signed by Lorence and Kvidera expressly states that the “Agreement runs through June 30, 2003.” The trial court did not err in concluding that Kvidera could only be terminated for cause.

**B. Rotation’s Argument that the Signed Employment Contracts are “bonus plans” or merely “references” to salary or bonus is without merit.**

The trial court was correct in finding Rotation’s assertions regarding the employment contracts “untenable.” In its summary judgment brief, Rotation attempted to get around the fact that the employment contract was for a specific duration by contending that “there is nothing in the ‘bonus plans’ that indicates anything about the duration of Kvidera’s employment, only the duration of the ‘bonus plan.’” Rotation further argued that the “bonus plan” did not alter Kvidera’s at-will status. Now, in its appellate brief, Rotation refers to the employment contracts as “references to salary” or “promises of bonuses” in order to rely on Harris v. Mardan Bus. Sys. Inc., 421 N.W.2d 350 (Minn. Ct. App. 1988) and Rognlien v. Carter, 443 N.W.2d 217 (Minn. Ct. App. 1989). In Rognlien, the court held a reference to an annual salary in a letter was not sufficient to create a contract. Id. at 354. In Harris, the court held that the right to buy stock for five years did not imply the right to employment for the same period.

Rotation argues that the above cases are similar because both have documents that “are silent as to termination and the duration of the employment.” However, the employment contract in the pending case is not a letter containing a “reference” to salary or right to buy stock. It is a fully executed employment contract containing the terms of Kvidera’s employment, including the specific duration. The trial court did not err in determining that Rotation’s cases were not factually similar.

Moreover, Rotation’s subjective argument that the term of duration is “incidental” or applies to only the bonus or salary carries no weight. A party’s subjective beliefs are not relevant to ascertaining contractual terms. See Schibursky v. IBM, 820 F.Supp. 1169, 1180 (D. Minn. 1993). Rotation completely ignores the contents of the fully executed documents entitled “Employment Contracts” to assert that they are merely bonus plans or that the duration applies only to the bonus plan. As the trial court noted, Lorence could have drafted the agreement differently if he actually intended the contract to only be a “bonus plan.” In Audette, 436 N.W.2d 125 (Minn. Ct. App. 1989), the court noted that the appellant could have used limiting language to avoid the result of contract formation. Id. at 127. The court stated that appellant could have indicated in its written policy that its provisions did not constitute an offer of an employment contract or otherwise state that the policy did not alter the status of at-will employees. Id.

In this case, Lorence could have opted against signing the documents or he could have changed its terms to avoid this result. Lorence’s own handwritten draft was entitled

“Employment Contract” which contained the specified durations, as well as other provisions. Lorence further helped to draft the agreement, and agreed that its terms were accurate. Finally, Lorence hurried to sign Kvidera to the second contract before the first term expired. The trial court correctly applied Minnesota law and concluded that the employment contract was for a specific duration and terminable only for cause.

**C. Rotation’s Contention that Employment Contracts that are Silent as to Termination are At-Will is Misleading.**

A proper statement of Minnesota law includes that employment contracts are considered at-will if they are silent as to termination and indefinite in duration. An employment contract simply does not need to contain both duration and termination conditions to modify at-will status. See Dorso Trailer Sales, Inc. v. American Body and Trailer, Inc., 372 N.W.2d 412, 414 (Minn. Ct. App. 1985)(stating unlike other types of agreements, employment contracts and sales agency agreements are ordinarily terminable at will if they do not contain express provisions for duration or termination.)(citing Benson Coop. Creamery Ass’n v. First District Ass’n, 151 N.W.2d 422 (Minn. 1967) and Miller v. O.B. McClintock Co., 297 N.W. 724 (Minn. 1941) (emphasis added); Audette, 436 N.W.2d 125, 126 (Minn. Ct. App. 1989)(an employment contract may modify an at-will status if it agreed to a specific duration or conditions for termination)(emphasis added); Gunderson v. Alliance of Computer Prof., Inc., 628 N.W.2d 173 (Minn. Ct. App. 2001), review granted (Jul 24, 2001), appeal dismissed (Aug 17, 2001)(absent an express or implied stipulation of duration, a contract is presumed to be at will).

Applied to the case at hand, the specified duration modified the at-will status. Duration is a job security provision for both parties. It is not uncommon for a company to want to assure that its highest officer will stay with the company for specified periods of time. Consequently, once Rotation signed the employment contract, that specifically ran through June 30, 2003, it was obligated to honor the contract unless Kvidera was terminated for cause.

Rotation argued in its brief that Kvidera stated that Lorence “made his call” attempting to imply that Kvidera in some way consented to the termination. In Olmstead v. Volkmuth, 1990 WL 52 (Minn. Ct. App. 1990)(unpublished), the court noted that an employment contract for a term of five years, and silent regarding termination, was terminable only for cause. Id. The court stated “employment contracts of a specific duration can be repudiated, but the employer becomes liable for breach of contract unless the termination of the employee is ‘for cause.’” Id. (citing Bang v. International Sisal Co., 4 N.W.2d 113, 115 (Minn. 1942) and Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)). Rotation’s argument is irrelevant. According to Minnesota law, Lorence can make his “call” but Rotation must still honor the contract.

Finally, Rotation’s argument that the handbook was an employment contract that contained terms that must be carried over to the employment agreements also fails. This specific argument was not raised in Rotation’s summary judgment memorandum and issues not raised at the trial court level cannot be heard for the first time on appeal.

Greenbrier Village Condominium Two Association, Inc. v. Keller Investments, Inc., 409

N.W.2d 519 (Minn. Ct. App. 1987). Regardless, Rotation's handbook expressly stated that it was not a "contract." (AA. 85) Thus, Rotation's argument has no merit.

Additionally, as cited above, at-will status is modified when parties enter into an employment agreement for a specified duration. The original at-will status was clearly changed when Lorence and Kvidera entered into employment contracts for specific durations. Moreover, this is precisely what the handbook stated must be done to modify an employee's at-will status. The handbook stated that the "at-will" status is modified when the president and the employee sign a formal contract "evidencing the company's intent to enter into a contract of employment." (AA. 85) Thus, Rotation's arguments fail for all of the above reasons and the trial court did not err in determining that Kvidera was terminable only for cause.

**III. THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT KVIDERA'S NON-DISCRETIONARY BONUS WAS A "WAGE" SUBJECT TO MINN. STAT. § 181.13 BECAUSE IT WAS WHOLLY CONTRACTUAL AND EARNED PRIOR TO HIS TERMINATION.**

Minn. Stat. § 181.13 provides that an employer must pay any "wages or commissions" owed to a discharged employee within 24 hours of demand by the employee. Minn. Stat. § 181.171 allows an injured employee to bring a civil suit against an employer that violates section 181.13. If such claim is successful, and a violation is found, the district court will order the employer to pay the attorney fees and court costs. Minn. Stat. § 181.171, subd. 3.

While not specifically addressing the issue of whether a non-discretionary incentive bonus is a “wage” under the statute, the Minnesota Court of Appeals has applied penalties under Minn. Stat. § 181.13 and § 181.14 where jury found that defendant had withheld an incentive bonus from plaintiff. Anderson v. Medtronic, Inc., 382 N.W.2d 512 (Minn. 1986). In that case, Medtronic initiated a management incentive bonus plan designed to pay high-level employees yearly bonuses based upon the company’s profitability and the employee’s individual performance. Id. at 513. The employee left to go to a competitor and Medtronic decided not to award him the incentive bonus since it believed he had violated the employee non-compete agreement. Id. at 514. The employee sued for breach of contract and the jury found Medtronic liable under Minn. Stat. § 181.13. Similarly, the jury in our case found that Rotation had withheld the incentive bonus from Kvidera. Thus, the trial court was subsequently correct in determining that Minn. Stat. § 181.13 was violated.

**A. Kvidera’s Compensation, Similar to Vacation Pay, was Earned Prior to Termination.**

The Minnesota Court of Appeals has determined that unused vacation time is a wage subject to the statute. Brown v. Tonka Corp., 519 N.W.2d 474 (Minn. Ct. App. 1994). The court determined that an employer is liable for penalties pursuant to § 181.13 for failure to provide vacation pay after termination. The court stated an employer’s liability for vacation pay is wholly contractual and that:

It is beyond dispute that an agreement to pay vacation pay to employees made to them before they performed their services, and based upon the length of service

and time worked, is not a gratuity but is a form of compensation for services, and when the services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or other form of compensation.

Id. at 477.

The same analysis applies the Kvidera's non-discretionary incentive bonus. The facts of this case differ from a discretionary bonus that an employer may decide to offer an employee as gratuity. Rather, the bonus here was "wholly contractual" and once Kvidera rendered his services and met the terms it was earned compensation. The bonus was also an integral part of Kvidera's compensation, of which Rotation enticed Kvidera to enter into the agreement and perform services pursuant to the agreement. As a result, a non-discretionary incentive bonus would also be considered a wage subject to the statute.

Rotation asserts that Kvidera's bonus should be treated the same as severance payment and relies on Cole v. Holland Neway Int'l, 2004 WL 503751 (Minn. Ct. App. 2004) (unpublished). However, the Cole court noted that "severance" differed from other wages, such as vacation pay, because it was not owed until after termination. The court stated that vacation pay was covered under Minn. Stat. § 181.13. Id. The court further stated that severance, as applied to the facts of the case, could not be earned and unpaid at the time of termination. Id. Vacation pay and bonus, to the contrary, are earned prior to termination and would fall under the statute. Kvidera's bonus was non-discretionary and Rotation agreed to pay it. Kvidera would have received this compensation had he not agreed to defer it until a later time. Kvidera's bonus differs from a discretionary bonus

where an employer may decide what, if any, bonus should be paid. Kvidera met the terms of the contract and earned the compensation prior to his termination.

Moreover, Minnesota law does not support Defendant's argument that a bonus is a benefit or wage supplement governed by Minn. Stat. § 181.74 and, therefore, would not fall under Minn. Stat. § 181.13. Minn. Stat. § 181.74 provides that an employer is guilty of a gross misdemeanor if it fails to pay benefits or wage supplements to employees within 60 days after such payments are required. This statute further defines the term "benefits or wage supplements" as including, but not limited to, "reimbursement for expenses; health, welfare, and retirement benefits; and vacation, separation or holiday pay." Minn. Stat. § 181.74 is unrelated to Minn. Stat. § 181.13.

As cited above, Minnesota cases have specifically involved bonus and vacation pay under Minn. Stat. § 181.13, even if they would also fall under Minn. Stat. § 181.74. Rotation cites Maida v. Maxi-Switch Co., 1989 WL 452 (Minn. Ct. App. 1989) (unpublished) as supporting its position. However, this case does not hold that a bonus is a benefit or wage supplement. Nor does this unpublished case hold that a bonus would solely fall under § 181.74. Rotation's argument is not supported by Minnesota law.

**B. Minnesota Statutes and Other Jurisdictions Support that a Bonus is a "Wage" Subject to Minn. Stat. § 181.13.**

Although the term "wages" is not defined by Minn. Stat. § 181.13, the Minnesota unemployment statute, Minn. Stat. § 268.035, Subd. 29, defines "wages" as including a

“bonus.” Even more important, Minn. Stat. § 541.07 applies a two-year statute of limitations for actions to recover “wages.” That statute defines “wages” as follows:

The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists and the term "damages" means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists.

Minn. Stat. § 541.07, Subd. 5. Applied to the case at hand, Kvidera’s bonus is clearly “remuneration for services” and would be subject to the statute. Minnesota statutes consistently define wages as including bonuses and the same should be applied to Minn. Stat. § 181.13.

Nebraska courts have also addressed a similar issue. In Knutson v. Snyder Industries, Inc., 436 N.W.2d 496 (Neb. 1989), the Nebraska Supreme Court affirmed a judgment in favor of the employee, holding that a bonus under an incentive plan constituted wages under the penalty statute, since the parties had agreed to it and the stipulated conditions had been met. The court explained that the test of whether a bonus is constitutes a wage under the statutory definition depended on whether the bonus was an inducement or an award, that is, whether the employer and employee had agreed to it beforehand. The court said that the wages must be compensation for labor or services, previously agreed to, and the conditions stipulated must have been met.

Similarly, in Rohr v. Ted Neiters Motor Co., 758 P.2d 186, the Colorado Court of Appeals held that that an employee’s bonus was a wage because it was both vested and

determinable at the time of termination. Applied to the case at hand, Kvidera earned his bonus and elected to defer receipt. Prior to litigation, Rotation did not dispute that this bonus was earned. The jury confirmed that Kvidera earned this bonus. As a result, the facts are similar to Knutson and the trial court did not err by considering Kvidera's bonus a wage under the penalty statute.

Rotation cites Louisiana law as being authoritative on the matter, and attempts to limit the statute as to how the wage is paid. However, Louisiana courts are split as to the scope of the penalty statute and the meaning of the phrase "by the day, week or month, etc." In Pearce v. Austin, 465 So2d 868 (La. Ct. App. 1985) the court explained that the phrase was merely illustrative and not exclusive and that the pay period as well as the rate of pay and the terms or lack thereof of employment should not be determinative of the statute's applicability in all circumstances. The more pertinent and relevant inquiry was the existence of the employment relationship rather than the rate or period of pay, term of employment or both. Applied to the case at hand, Kvidera's earned compensation was at the very least paid in "piece." Notwithstanding, the statute should be considered all-inclusive as to the manner of pay. The trial court did not err.

**IV. THE DISTRICT COURT DID NOT CLEARLY ERR IN DETERMINING THE AMOUNT OF REASONABLE ATTORNEY FEES EXPENDED TO RECOVER UNDER THE STATUTE.**

Minn. Stat. § 181.171(3) requires the Court to assess attorney's fees in any action based on Minn. Stat. § 181.13, including, reasonable costs, disbursements and witness

fees. A prevailing plaintiff is entitled to an award of attorney's fees under Minn. Stat. § 181.171(3). The provisions of Minn. Stat. § 181.171 mandate that the court order statutory penalties and attorney fees to the prevailing Plaintiff. See Schultz v. Maverick Construction Co., 1999 WL 243447 (Minn. Ct. App. 1999)(unpublished). The statute does not state that the attorney fees must be allocated to the portions of recovery. Rather, it is the court's discretion to award reasonable attorney fees pursuant to the statute.

The trial court's determination of attorney fees was not clearly erroneous. Plaintiff's claims were all brought under Minn. Stat. § 181.13. The Defendants denied all claims on the same basis, including that Plaintiff breached his fiduciary duties, and thus refused to pay his earned bonus. Consequently, the district court determined that the full amount of work expended in the case was necessary regardless of whether the damages included the bonus or breach of contract.

As noted by the district court, Rotation never made an offer to plaintiff during the whole litigation. Kvidera was forced to sue and defend himself in order to recover under the statute and the same amount of time was justified and required for Plaintiff to make any recovery, under either the 2001 or 2001 employment contracts. Minnesota case law does not stand for the position that attorney fees must be apportioned according to the amount of damages. Rather, all amounts were reasonable and necessary for any recovery, bonus and/or contract, pursuant to the statute. The trial court did not clearly err.

**V. KVIDERA'S APPELLATE ATTORNEY FEES AND COSTS SHOULD BE AWARDED TO SUSTAIN THE STATUTE'S PURPOSE.**

A party who prevails at the trial court level and who is awarded statutory attorney fees may be entitled to recover attorney fees on appeal. Bunko v. First Minn. Sav. Bank, F.B.S., 471 N.W.2d 95, 99 (Minn. 1991)(stating to deny attorney fees in such a situation would undermine the purpose of the statutory requirement). Respondent Kvidera has incurred additional attorney fees, costs and charges attributable to this appeal. (RA. 61). As a result, said amount should be awarded to respondent to sustain the purpose of the statute.

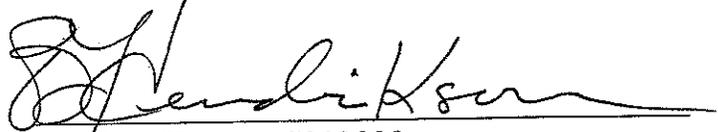
**CONCLUSION**

The trial court correctly determined that Kvidera was under contract with Rotation for a specified duration. Minnesota law is clear that employment contracts for a specific duration are terminable only for cause. The trial court correctly held that Rotation's failure to pay Kvidera's earned bonus was a violation of Minn. Stat. § 181.13. The trial court also did not clearly err in determining the amount of attorney fees because Kvidera was forced to litigate to make any recovery. Finally, appellate attorney fees and costs should be awarded to Kvidera to sustain the statute's purpose.

Respectfully submitted,

Dated: 4-1-05

DONOHUE McKENNEY LTD.

A handwritten signature in black ink, appearing to read "Brad Hendrikson", written over a horizontal line.

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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).