

CASE NO. A07-1820

State of Minnesota
In Court of Appeals

JONATHAN GOODMAN,

Appellant,

vs.

BEST BUY, INC.,

Respondent.

APPELLANT'S REPLY 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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SUPPLEMENTAL STATEMENT OF CASE¹

Goodman was born in Sierra Leone in 1956 and entered the United States in 1986. (Goodman affidavit dated 8/10/06; Goodman depo. at 70-71). He later became a United States citizen. (*Id.*). He is married and has two children. (Goodman affidavit).

Goodman had a steady career prior to working for Best Buy. (Goodman affidavit of 8/10/06). He was employed by Decision One from 1993 through 1998. (Goodman depo. at 75-6). Between 1998 and 2001, he worked through the Alternate Resource Center (ARC) at IBM. (Goodman depo. at 71-73). From June through December of 2001, Goodman worked at Target Corporation. (*Id.* at 73).

Goodman was hired as a temporary employee at Best Buy in September of 2002. (Goodman depo. at 75, 80). This was a full-time position in the customer call center. (Goodman depo. at 80). After being in the temporary position for six months, Goodman's performance was evaluated and Best Buy offered him a permanent position. (Goodman affidavit). Goodman worked 9:00 a.m. to 5:30 p.m. five days a week—Monday, Tuesday, Wednesday, Friday, and Saturday. (Goodman depo. at 26-7). He was off work every other Thursday and all Sundays. (*Id.*). Goodman's duties were to take incoming calls through an 888 assigned

¹ Goodman includes a supplemental factual recitation to avoid waiving any argument. *In re Olson*, 648 N.W.2d 226 (Minn. 2002)(holding arguments not addressed in the brief are deemed waived on appeal). However, it is Goodman's position that this Court should not address the merits of Goodman's MHRA claim because it was not decided by the trial court.

telephone number, resolve customer issues such as problems with purchases and store problems, and research repair issues. (Antoniou depo. at 6-7). The call center position was often stressful and his supervisor suggested that Goodman walk away when things got too stressful. (Goodman affidavit).

Goodman's initial supervisor was Tina Ahmed. (Goodman depo. at 17; Goodman affidavit). After May of 2004, Ivan Antoniou was Goodman's supervisor. (Antoniou depo. at 4; Goodman affidavit; Goodman depo. at 192). Goodman was reviewed by his supervisors during weekly one-on-one meetings and annually. (Goodman depo. at 198). In 2003 and 2004, Goodman had positive annual performance reviews. (Goodman depo. at 186-195). In his performance review dated March of 2003, Goodman was commended for his attendance. (Goodman depo. at 191-194).

Best Buy issued a document called Attendance Guidelines.² (Antoniou depo. at 10; Resp. App. 147). Goodman was provided with a copy. (Goodman depo. at 100-01). It provided:

During a rolling 12 month period discipline related to absences will apply:

- 6 absences.....Verbal notification
- 7 absences.....Written Warning
- 8 absences.....Final Warning
- 9 absences.....Termination

² Best Buy refers to it as an "Attendance **Policy**." (See e.g. Resp. Brf. at 2, 3, 32-33). In fact, it is an "Attendance **Guideline**." The word "Guideline" suggests a more lenient standard.

* * * *

The following will be excluded from calculations regarding attendance:

- Scheduled Vacation or Personal Holiday
- Time Missed due to a legitimate work-related injury
- Inclement Weather: Management at its discretion, may elect to excuse all absences and/or tardies on a given day based on weather conditions
- Approved Military, Jury Duty, Medical, or Personal Leaves of Absence
- Reasonable Accommodation under the ADA
- Approved time off under the FMLA
- ~~• Approved time off for religious reasons~~
- Death of an immediate family member
- Illness of the employee requiring overnight hospitalization
- Illness of an employee's child, spouse or parent requiring overnight hospitalization

* * * *

Special consideration under ADA or FMLA provision will be managed separately.

(Resp. App. 149-150). If there was an unplanned absence it was accounted for by having the affected employee call into a central attendance line and leave a voice mail message reporting his name, employee identification number, expected length of absence, and a phone number. (Goodman depo. at 40-44; Antoniou depo. at 56). Absences would be logged by a computer attendance accounting system. (Goodman depo. at 110-112; Antoniou depo. at 16-17; Goodman affidavit). The information would be provided to the supervisor for discussion one-on-one. (Goodman affidavit).

When the computer system incorrectly reflected an absence, the employee could object. (Goodman depo. at 110-116; Goodman affidavit). Goodman did so. (Goodman affidavit). He was forced to sign the performance notices with the incorrect absence information. (Goodman affidavit). The notices specified: "I am not necessarily agreeing with its content but am acknowledging receipt." (*See e.g.*, Resp. App. 121).

Goodman had nine absences between 5/16/04 and 2/18/05. (Resp. App. 110).³ He objected to all of these days being counted against him. The 12/17/04 and 12/18/04 half days were improperly attributed to him. (Goodman depo. at 112-116; 169-172; Goodman affidavit). On those days, he switched schedules with a co-worker and this had been approved. (*Id.* at 112-116). Goodman received a performance notice on 12/20/04 advising these absences were counted against him. (Resp. App. 121).

Goodman was forced to sign the notice but he objected and completed a form to have his record corrected. (Goodman depo. at 112-116). The record was not corrected. (*Id.*).

Goodman has high blood pressure (also known as hypertension)⁴ and back problems. (Goodman affidavit of 8/10/06).⁵ The hypertension was first

³ The listed days were: 5/26/04; 7/14/04; 8/16/04; 9/11/04; 10/16/04; 10/30/04; 12/17/04 (1/2 day); 12/18/04 (1/2 day); 2/11/05; and 2/18/05. (Resp. App. 110).

⁴ High blood pressure is hypertension. (Hockett depo. at 42).

diagnosed in 1989 during a physical for his residency documentation. (*Id.*). Hypertension is a situation in which the body's normal circulatory pressure is elevated above or to a point of organ damage. (Hockett depo. at 41). Hypertension is referred to as a "silent killer" because many patients have no symptoms even though the condition is doing damage to body systems. (*Id.* at 18-19). Hypertension can lead to cardiovascular problems, stroke, blindness, kidney failure, and peripheral vascular disease. (*Id.* at 20). —

Goodman treated with Dr. Wolfe of HealthPartners, North Memorial Medical Center, Columbia Park Medical Group, and Hennepin County Medical Center in Minneapolis, MN.. (Goodman depo. at 83-84; Exhs. E & F to Miller affidavit of 5/25/07; Goodman affidavit).

Dr. Wolfe prescribed Norvasc, water pills, dietary restrictions, and exercise. (Goodman affidavit or 8/10/06; Goodman depo. 83-84). But Goodman did not always have health insurance. (Goodman affidavit; Hockett depo. at 12-13; Resp. App. 138). Just prior to the termination, Goodman had been "between insurance" and had stopped taking his blood pressure medication. (Goodman depo. at 83; Resp. App. 138).

Goodman had periodic flare-ups from his high blood pressure causing him to be quite sick. (Goodman depo. at 88-91;105; 173-174).

⁵ Goodman also has neck and back problems stemming from a car accident for which he had had surgery. (Goodman affidavit; Goodman depo. at 106-08).

Q: Mr. Goodman, can you explain for the record how your condition of blood pressure actually happens to you?

A: Well, sometimes if I get up in the morning, my head will be pounding continuously, and then I will have dizziness, lightheadedness, and then my vision will be blur, so those are the condition, and I just feel fatigue.

Q: Are the conditions always the same, or do you have times where it is a little aggravated more than other times?

A: That's correct. Sometimes it's, yeah, it's more aggravated . . .

(Goodman depo. at 173).

Goodman had several conversations with Tina Ahmed and Ivan Antoniou in which he explained he had high blood pressure and it periodically flared and made him ill. (Goodman affidavit; Goodman depo. at 103-04; 108; 117; 137-139). He also revealed his hypertension problem to co-workers. (Goodman depo. at 116-17).

Q: [D]id you ever tell either Ms. Ahmed or Mr. Antonio that any of the absences for which you were being disciplined were the result of a blood pressure condition?

A: Did I ever tell them that?

Q: Yes.

A: I told – yeah, I told Tina Ahmed about that.

Q: You did?

A: Yes, but not with the absence, but I related that to the absence. Whenever we meet, I tell her that I have a blood pressure condition. And if they, you know, maybe sometimes I call in because I'm feeling sick, right, maybe my blood pressure is up.

Q: Okay.

* * * *

Q: You discussed the written warnings with Ms. Ahmed?

A: That's correct.

Q: Did you ever tell Ms. Ahmed when you received one of the written warnings that she gave you that any of the absences that she had recorded were absences as a result of your blood pressure condition?

A: That's correct.

(Goodman depo. at 137-138)

Q: Did you ever tell Mr. Antonio that any of the absences that he listed on any of the written warnings he gave you were absences –

A: For my condition.

Q: --as a result of your blood pressure condition?

A: That's correct.

Q: When did you have those conversations with –

A: When we meet one-on-one.

Q: Whenever you met one-on-one?

A: That's correct. I would tell him about my condition. If he bring the attendance, I will relate that to him because I'm sick, you know.

(Goodman depo. at 139).

On February 17, 2005, Goodman was ill and went to see Dr. Hockett.

(Goodman depo. at 30-35; Goodman affidavit). His blood pressure was very high.

(Goodman depo. at 30-35).

Blood pressure: initially 240/140 on recheck 197/136.

* * * *

Malignant hypertension, uncontrolled. . . . I advised the patient to start an aspirin daily. We need to get his blood pressure down, and will start him on Norvasc 5 mg daily for a few days, then increase it right away to 10 mg. . . . If any actual chest pain symptoms develop, the patient needs to call 911 immediately. He understands the risks.

(Resp. App. 138). Dr. Hockett gave him the prescription and instructed Goodman on what to eat, how to act, how to rest and how to take care of himself. (Goodman depo. at 30-35; Hockett depo. at 48- 49). Dr. Hockett provided Goodman with an off work slip through February 21, 2005. (Goodman depo. at 39; 56-59; Hockett depo. at 24-26).

Goodman was rechecked a few days later and the doctor noted: "Hypertension, with improved control. At this point, we still have not achieved maximum control. I increased his Norvasc." (Resp. App. 136). A month later Goodman had "plateaued" and was directed to add hydrochlorothiazide. (Resp. app. 134). March 28, 2005 the blood pressure was still "not real well controlled." (Resp. App. 129). Goodman's blood pressure was higher in May of 2005 (186/112); the doctor recorded Goodman was experiencing malignant essential hypertension. (Resp. App. 126). A month later Goodman was still having uncontrolled hypertension. (Resp. App. 125).

Goodman called the absence voicemail and reported his absences for both 2/18/05 and 2/19/05. (Goodman depo. at 26, 45, 48). He returned to work on 2/21/05 although he felt terrible. (Goodman depo. at 49; 51-55). Just before the end of his shift, Antoniou called Goodman into the conference room. (Goodman

depo. at 51-55; Antoniou depo. at 9). Antoniou told Goodman he had had nine absences and was being fired. (Goodman depo. at 20; 51-55; Antoniou depo. at 9). Goodman provided Antoniou with a copy of Dr. Hockett's off work slip and Antoniou told him to wait while he checked with his boss. (Goodman depo. at 51-59). After a few minutes Antoniou returned and reiterated Goodman was being fired. (*Id.*).

In December of 2005 Goodman was admitted to Hennepin County Hospital due to elevated blood pressure readings at 234/147 & 213/128. (Exh. F to Miller affidavit). He was rushed to the ER at Hennepin County in January of 2006 with severe hypertension. (Goodman affidavit; exh. F). He had a similar trip to the ER in August of 2006. (*Id.*).

ARGUMENT

The Scope and Standard of Review

The parties agree the standard of review here is *de novo* on all issues. However, Best Buy asserts since Goodman did not raise equitable tolling below, this Court should limit the scope of review and decline to consider his arguments on equitable tolling. This is incorrect. Goodman did address equitable tolling to the district court. It is discussed at length on pages 6-7 in the district court brief. *See* Goodman Brf. attached at Reply Appendix. The argument based on the doctrine of paramount authority is simply more support for Goodman's general contention that Minnesota principles of equity should be applied to toll the statute of limitations in his situation. Goodman is certainly allowed to flesh out his

arguments on appeal. *Plaza Associates v. Unified Development Inc.*, 524 N.W. 2d 725, 731 n.1 (Minn. Ct. App. 1994).

Additionally, Best Buy's assertion that Goodman has *conceded* he did not raise equitable tolling below is a misstatement. Goodman merely stated equitable tolling was not *addressed* by the district court to support his argument that the district court is owed no discretion on this issue. Goodman made no concession regarding this issue, as he clearly raised the argument in his brief to the district court.

Furthermore, this Court may consider any matter as the interest of justice may require if the argument is closely akin to arguments raised below and no new facts require development. Minn.R.Civ.App.P. 103.04; *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 688 (Minn. 1997); Magnuson & Herr, *Minnesota Practice Series: Appellate Rules Annotated*, §103.16 p. 76 (2007 Ed). First, the doctrine of paramount authority is simply another variant of equitable tolling – an argument that was made but not addressed by the district court. Secondly, no new facts are necessary to apply it to Goodman, as the facts bearing on the doctrine are purely procedural and concern whether Goodman was prevented from refiling in state court while he awaited a decision from the federal court. These facts are part of the record and require no new elaboration for the doctrine to be applied.

I. THE PROPER INTERPRETATION OF 28 U.S.C. §1367(d) IS NOT MADE BY TALLYING THE FEW DECISIONS THAT EXIST ON THE ISSUE.

Best Buy's predominant argument is that more courts agree with Best Buy than agree with Goodman. Best Buy exaggerates the strength of these numbers. The issue has been decided in four jurisdictions only. In one of those jurisdictions, California, there is a split.⁶ None of the decisions Best Buy relies upon are binding on this Court. This Court should conduct its own analysis and adopt the best rule. Furthermore, regardless of the "head count," a majority does not mean very much where only three states and one territory have considered an issue. The weight Best Buy assigns to these decisions is unwarranted.

II. THE PLAIN LANGUAGE OF THE FEDERAL TOLLING STATUTE SUPPORTS GOODMAN'S POSITION.

The statute provides that a period of limitations is tolled "while the claim is pending and for a period of 30 days." "And" indicates that two things must be aggregated.

Best Buy urges that the tolling language preceding the "and" simply means the statute will not run while the action is pending in federal court. There would be no need for the word "and" if Best Buy's interpretation were correct. Under Best Buy's construction, there would be nothing to add to the 30 days and no

⁶ Because one of the California cases Best Buy relies upon only assumes, but does not address, whether a plaintiff is entitled to the time left over in his statute of limitations, it is not properly cited. *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 98 Cal Rptr.2d 153, 156 (2000). The issue in *Kendrick* was whether the statute of limitations was "pending" until the United States Supreme Court denied petition for certiorari. 82 Cal. App. 4th at 368, 98 Cal. Rptr.2d at 156).

purpose for the word “and.” If all plaintiffs were meant to have only 30 days to file their new action, the statute could have so stated. Language to the effect that actions must be filed within 30 days of dismissal is not hard to draft. A simple phrase would have accomplished the goal. This is precisely what the Minnesota Legislature did in Minn. Stat. §541.18:

Except where the Uniform Commercial Code otherwise prescribes, if judgment be recovered by plaintiff in an action begun within the prescribed period of limitation and such judgment be afterward arrested or reversed on error or appeal, the plaintiff may begin a new action within on year after such reversal or arrest.

Minn. Stat. §541.18. This statute makes clear that a simple grace period of one year is allowed for timely filing of a new action. Had Congress desired the same effect under the federal tolling statute, it could have drafted the language similarly.⁷ But Congress did not. It is Best Buy’s interpretation that reads entire phrases out of the statute.

Best Buy states in its brief, “[t]here is no reason to grant an additional 30-day period if the plaintiff has all of the time remaining on the original statute of limitations.” *See* Resp. Brf. at 14. But this response makes no sense. The clear reason for the 30-day period is to afford those plaintiffs who filed on the eve of the running of the statute of limitations a reasonable time to re-file after the federal

⁷ *See also Black’s Law Dictionary*, 7th, 1999 (defining tolling statute as: “ A law that *interrupts* the running of the statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction.”)(Emphasis added). “Interruption” suggests something that is stopped and started again, the very interpretation that Goodman argues here.

court dismisses their case. Suspension of the statute of limitations alone would not help such persons. An extra period is needed to accommodate these plaintiffs. The 30-day period is not superfluous as it helps those plaintiffs for whom suspending the running of the statute is unhelpful. Others, who had time remaining on the limitations period, get credit for that time *and* 30 days.

By contrast, where the Minnesota Legislature provides for tolling, it uses different language. An example is Minn. Stat. §541.13 which tolls the 6-year statute of limitations on personal injury actions against persons who are absent from the state:

When a cause of action accrues against a person who is out of the state and while out of the state is not subject to process under the laws of this state or after diligent search the person cannot be found the purpose of personal service when personal service is required, an action may be commenced within the times herein limited after the person's return to the state; and if, after a cause of action accrues, the person departs from and resides out of the state and while out of the state is not subject to process under the laws of this state or after diligent search the person cannot be found for the purpose of personal service when personal service is required, the time of the person's absence is not part of the time limited for the commencement of the action.

Minn. Stat. §541.13 (emphasis added). Under this statute, the clock stops and restarts based on the length of time the defendant is absent. This effect is referred to as "tolling." See *e.g. Long v. Moore*, 295 Minn. 266, 267, 204 N.W.2d 641, 642 (1973). See also Minn. Stat. 541.15 (suspending time when the plaintiff is under disability).

Under the only logical reading, the federal tolling statute provides for both suspension *and* a period of 30 days.

III. GOODMAN'S INTERPRETATION DOES NOT OFFEND ANY POLICY UNDERLYING THE FEDERAL TOLLING STATUTE.

Best Buy claims Goodman's interpretation of §1367(d) is inconsistent with the overriding policy of promoting prompt pursuit of claims. But the Supreme Court has explained the purpose of the federal tolling statute and it is not as Best Buy claims. *Jinks v. Richland County*, 538 U.S. 456, 463 (2003). The statute was designed to promote "fair and efficient operation of the federal courts," who before the passage of the tolling statute struggled to help preserve plaintiffs' claims that had become time-barred in state court. *Id.* It replaces the federal courts' "selection of inadequate choices with the assurance that state-law claims asserted under §1367(a) will not become time barred while pending in federal court." *Id.* In other words, the concern that animated the passage of §1367(d) was for plaintiffs more than defendants. If anything, the policy at issue here, the preservation of state law claims over which the federal court has declined to exercise jurisdiction, favors a more generous reading of the federal tolling statute rather than a restrictive one.

In addition, Best Buy's complaint that a Minnesota defendant should not be "hailed [sic] into court a decade after the claim arose" is a red herring. There are already circumstances that require a Minnesota defendant to defend a state law claim after a protracted period. The operation of Minn. Stat. §541.17 is one

example. There, the statute of limitations can be suspended for up to seven years, creating a limitations period well over a decade.

IV. GOODMAN'S CLAIM IS SAVED BY MINNESOTA LAW REGARDLESS OF HOW THE FEDERAL TOLLING STATUTE IS INTERPRETED.

Best Buy ignores the most crucial fact in this case: **Goodman filed a timely complaint in state court.** It is through no fault of his own that his case was in federal court, as his state claims were removed by Best Buy. Best Buy caused Goodman to be in federal court and should not now complain that a claim, of which it was aware and about which it conducted discovery, is too late.

Best Buy argues that Minnesota's doctrine of paramount authority does not help Goodman's claim because it does not provide him with more than the 30 days mentioned in the federal tolling statute. This is clearly wrong.

First, the federal tolling statute by its terms incorporates state law and allows for longer periods of limitation if state law calls for them. Even if the federal tolling statute only provided a 30-day grace period, state law comes into play if it "provides for a longer tolling period." 28 U.S.C. §1367(d).

The doctrine of paramount authority is just such a state law. It suspends the period of time during which Goodman's claim was in federal court. *St. Paul, M&M Ry. Co. v. Olson*, 87 Minn. 117, 122, 91 N.W.2d 294, 297 (1902). In that case, the Court held that "the time during which the question of the title to the land was pending and undetermined in the land department cannot be counted against the plaintiff in determining whether the statute of limitation has barred its right to

recover its land.” 87 Minn. 122, 91 N.W.2d 297. Under this doctrine Goodman should be credited with the time when his claim was held up in federal court and during which the state court had no jurisdiction to hear his claim.

Minnesota law “provides for a longer tolling period.” Under 28 U.S.C. §1367(d), therefore, even if the federal tolling statute only supplies a 30-day grace period, Goodman’s claim is saved by Minnesota’s law of equitable tolling.⁸

Regarding the equitable tolling doctrine, Best Buy argues that Goodman should not get the benefit of any doubt as to his time limits because the law is clear. This is disingenuous. Best Buy argues in its brief that the statute itself is ambiguous stating, “one can plausibly read the language as requested by Goodman or as simply saying that the statute of limitations cannot expire during the duration of the federal action.” (Resp. brf 14-15). If the statute is ambiguous, as Best Buy asserts, Goodman should not bear the burden of this unclarity.

V. GOODMAN’S MHRA CLAIM SHOULD NOT BE DISMISSED ON THE MERITS.

A. This Court Should Not Reach an Issue that Two Trial Courts Have Declined to Decide.

This Court should not decide whether Goodman’s MHRA disability discrimination claim was legally sufficient because that issue was not decided below. In general, this Court does not decide issues that were not presented to and

⁸ Put differently, it is not necessary for Goodman to invoke the federal tolling statute in order for his claim to be timely. Minnesota law provides him with an extra sixteen months to file his state claim. This is the time the federal case was pending.

considered by the trial court. *See e.g., Estes v. State Farm Fire & Cas. Co.*, 358 N.W.2d 522, 524 (Minn. Ct. App. 1984); *Leach v. Illinois Farmers' Ins. Co.*, 354 N.W.2d 119 (Minn. Ct. App. 1984). Whether Goodman had a legally sufficient claim of disability discrimination was presented to both Judge Doty and Judge Lefler. Yet, both judges declined to consider this motion. This Court, therefore, should not reach the merits of this motion until it has been decided by a trial court.

Furthermore, this Court should not address the sufficiency of the MHRA claim because there is unclarity over the evidence that this Court may consider. This Court may only consider those papers, exhibits, and transcripts actually filed in the trial court. *In re Block*, 727 N.W.2d 166 (Minn. Ct. App. 2007); Minn.R.Civ.App. P. 110.01. More specifically, a party may not include in its appellate appendix, portions of deposition testimony not submitted to the trial court. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 543 n.7 (Minn. 2001).

Best Buy provided this Court with portions of the deposition of Ivan Antoniou that were not submitted to the trial court.⁹ If the record was insufficient to support Best Buy's summary judgment motion, it would be improper for this Court to reach the issue. This Court should remand the issue to allow the trial

⁹ In its Appendix on appeal, Best Buy submitted the following pages from Ivan Antoniou's deposition that were not attached to any affidavit filed in the trial court: pp. 24, 55, 57, 60-61. The deposition pages actually submitted to the trial court were: pp. 1, 4, 9-12, 30, 56, 67 (attached to Mark Miller's affidavit of 5/15/07 and pp. 6-7, 17, 58-59, 62 (attached to Shalanda Ballard's affidavit of 5/4/07).

court to receive all necessary evidence in connection with the motion for summary judgment and render a decision based on the admitted evidence.¹⁰

B. Genuine Issues of Material Fact Preclude Summary Judgment that Goodman Was Not a Disabled Person Under the MHRA.

It is a violation of the MHRA to discharge an employee because of a disability. Minn. Stat. §363A.08, subd. 2. A plaintiff may prove discriminatory intent by direct evidence or by using circumstantial evidence in accordance with the three-part burden-shifting test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (2001); *Meads v. Best Oil Co.*, 752 N.W.2d 538, 542 (Minn. Ct. App. 2006). A plaintiff establishes a *prima facie* claim of disability discrimination by showing: (1) s/he is a member of a protected class; (2) s/he was qualified for the position from which s/he was discharged; and (3) s/he was replaced by a non-member of the protected class. *Hoover*, 632 N.W.2d at 542. If there is a *prima facie* case, the burden of production shifts to the defendant to produce admissible evidence to allow a reasonable trier-of-fact to conclude that there was a legitimate non-discriminatory reason for the discharge. *Id.* If the defendant does so, then the plaintiff must establish that the employer's proffered reason is a pretext for discrimination.

¹⁰ If this Court address the merits of the MHRA claim, it should strike from the record all portions of Best Buy's Appendix that were not submitted in evidence to the trial court. See *In the Matter of the Welfare of T.D.*, 731 N.W.2d 548, 557 (Minn. Ct. App. 2007)(holding that Court of Appeals will strike materials from consideration that were not submitted to the trial court).

A disability is: “any condition or characteristic that renders a person a disabled person.” Minn. Stat. §363A.03, subd. 12. Who is a disabled person is broken down into three alternative. A disabled person is someone who: (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. *Hoover*, 632 N.W.2d at 543; Minn. Stat. §363A.03, subd. 12.

Best Buy challenges only two elements of this proof construct: (1) that Goodman was a member of a protected class, *i.e.* that he was disabled; and (2) that Best Buy’s reason for terminating Goodman was not a pretext for discrimination. Goodman has brought forward sufficient evidence on both elements to survive a motion for summary judgment.

The first prong of the MHRA disability definition requires that the plaintiff has a physical, sensory, or mental impairment which “materially limits one or more major life activities.” Minn. Stat. §363A.03, subd. 12. The “materially limits” language represents a change from earlier language calling for a “substantially limits” standard. *See Sigurdson v. Carl Bolander & Sons, Inc.*, 532 N.W.2d 225, 228 & n. 3 (Minn. 1995). In particular, the “materially limits” standard is less demanding than the “substantially limits” standard (which remains the federal statutory standard). *Sigurdson*, 532 N.W.2d at 228 n.3; *Hoover*, 632 N.W.2d at 543 n.5. As a consequence, although Minnesota courts often follow

federal case law in interpreting the MHRA¹¹, where the issue is whether a particular condition is a disability, federal decisional law is of limited use to a Minnesota court. *Hoover*, 632 N.W.2d at 543 n.5 (rejecting federal decisions regarding whether fibromyalgia is disabling because the MHRA's definition of disability is less stringent than the federal definition).

Whether a particular condition "materially limits" one or more major life activities,¹² is evaluated based on the plaintiff's specific circumstances. *Hoover*, 632 N.W.2d at 543. This is in accord with the policy of evaluating disability status individually. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483 (1999)(holding whether a particular condition is a disability requires an individualized inquiry). Indeed, it is contrary to public policy to base a disability-status determination on how a particular condition affects the general population as this can lead to the discriminatory stereotyping – a consequence such anti-discrimination laws were intended to thwart. *Sutton*, 527 U.S. at 483-484. Where

¹¹ See e.g., *Kolton v. Anoka Co.*, 645 N.W.2d 403, 407(Minn. 2002)(recognizing that the ADA and MHRA are sufficiently similar that Minnesota courts may look to guidance under the ADA); *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 623 (Minn. 1988)(recognizing Court's frequent reliance on federal decisions under Title VII in deciding cases under the MHRA); *Sigurdson v. Isanti Co.*, 386 N.W.2d 715, 719 (Minn. 1986)(applying federal statutory interpretation because of similarity between federal law and MHRA); *Danz v. Jones*, 263 N.W.2d 395, 398-399 (Minn. 1978)(same).

¹² The statute speaks of "one or more" major life activities. Minn. Stat. §363A.03, subd. 12. This Court has held, therefore, that it is error to focus on just one major life activity where more than one is impacted by the plaintiff's condition. *Gee v. Minnesota State Colleges & Universities*, 700 N.W.2d 548, 553 (Minn. Ct. App. 2005).

assistive devices or medication ameliorate the effects of an impairment disability status must be evaluated in light of the impact that such device or medication has on the individual. *Sutton*, 527 U.S. at 488 (holding whether an impairment is substantially limiting must be based on the actual situation of the claimant; not a hypothetical situation if the claimant did not employ assistive devices).

Conversely, if the plaintiff does not or cannot use assistive devices or medication, the degree of limitation must be measured by the actual situation; not a hypothetical situation that would exist if devices or medication were employed. Hence, where a plaintiff declined to use medication to ameliorate her agoraphobia for fear of addiction, her impairment status had to be evaluated based on her non-medicated state. *Keuchle v. Life's Companion, P.C.A., Inc.*, 653 N.W.2d 214, 221 (Minn. Ct. App. 2002).

Working is a major life activity. *Hoover*, 632 N.W.2d at 542; *Gee*, 700 N.W.2d at 553; 29 C.F.R. §1630.2(i)(2007)(identifying “working” as an example of a major life activity). Under the MHRA whether an impairment materially limits the major life activity of working involves the following factors: (a) the number and type of jobs from which the impaired individual is disqualified; (b) the geographic area to which the plaintiff has reasonable access; (c) the plaintiff's own job expectations and training; (d) the criteria or qualifications in use generally; and (e) the types of jobs to which the rejection of the plaintiff would apply. *Hoover*, 632 N.W.2d at 543 & n.6.

Goodman has made out a sufficient showing that he was disabled because he was materially limited in the activity of working. Goodman's high blood pressure caused him serious difficulties with his health on an intermittent basis. It would wax and wane and suddenly cause severe symptoms – occasionally requiring hospitalization. His doctors referred to the condition as malignant hypertension and reported that it was not controlled with medication. When it flared, Goodman would be sick and miss work.

As a result Goodman missed a lot of days for sickness. He had nine absences (one full day of which he disputed) in a 12 month period due to his blood pressure impairment. When his condition was aggravated, Goodman would experience serious symptoms of dizziness, lightheadedness, blurred vision and headaches. He would have to address his condition because of the serious consequences of radically elevated blood pressure.

The inability to predictably attend work materially limits the ability to work in any occupation. Most employers require regular and predictable attendance. Hence it is likely that Goodman would find his condition limiting not only in the specific job of call center operator but other fields as well and in other locales.

Goodman told his supervisors about his blood pressure problems and that this was causing his absences. He repeatedly informed both supervisors of his medical problems and the relationship to his attendance issues. Yet, all that Best Buy did was offer the stunningly ineffective advice to get up and walk away from his cubicle when he felt too much stress. At no time did Best Buy suggest or

inquire about reasonable accommodations that Goodman might need such as modified work schedules or duty restructuring.

Interestingly, Best Buy's Attendance Guidelines provides that absences protected under the ADA and FMLA will be separately handled. Yet, neither Ahmed nor Antoniou did anything to comply with ADA or FMLA requirements. Although informed that the multiple absences were attributable to Goodman's high blood pressure all that they did was instruct Goodman to sign his performance notice sheet and take a walk. They did nothing constructive to insure compliance with FMLA or ADA (MHRA) assistance. This is not the way the disability protections under the MHRA were supposed to work.

Best Buy responds that Dr. Hockett testified Goodman was able to work without restrictions. But this misunderstands the import of Dr. Hockett's testimony. He restricted Goodman from work during the severe flare up he experienced in February of 2005. By this recommendation, Dr. Hockett was representing that Goodman was so incapacitated that his ability to work and carry out his daily activities during the flare up required Goodman to remain off work. Goodman has offered sufficient evidence to make out a prima facie claim that he was disabled.

Goodman also satisfies the record of impairment prong of the disability definition. Minn. Stat. §363A.03, subd. 12. "Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R.

§1630.2(k). To prove “record of impairment,” there must be evidence that the employer knew more than that the employee was absent from work. *Miller v. National Cas. Co.*, 61 F.3d 627, 629-630 (8th Cir. 1995). A record of impairment can be established by evidence that the plaintiff had hospital treatment for the condition of which the employer was aware. *School Board of Nassau Co. v. Arline*, 480 U.S. 273, 281 (1987).

In this case Goodman had a record of hypertension that was well-known to his supervisors and co-workers. More importantly, Goodman’s supervisors knew that Goodman’s high blood pressure was causing him absenteeism problems. This is a record of impairment for purposes of the MHRA.

Moreover, when Goodman produced a written record that he needed time off for his medical problem, his supervisor responded by consulting management and then immediately firing Goodman. This chain of events suggests that management at Best Buy was interested in ridding itself of an employee whose medical condition was escalating. In short, the written record was the last event that happened before Best Buy decided to terminate. Goodman has satisfied the record of impairment prong of the definition of disability.

The third prong of the definition concerns a plaintiff who is regarded as having an impairment. Minn. Stat. §363A.03, subd. 12. This prong was intended to embrace cases where the plaintiff does not actually have the impairment or has it, but not to a materially limiting degree yet the employer regards the employee as

disabled. *Cooper v. Hennepin Co.*, 441 N.W.2d 106, 112 (Minn. 1989). *See also* 29 C.F.R. §1630.2 (l).

The United States Supreme Court recognized in *Sutton* that hypertension was particularly susceptible to claims of “regarded as” discrimination observing that an employee with controlled hypertension might be regarded as disabled. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 488 (1999).

Goodman was fired after providing his doctor’s off work slip. This suggests that at the point that Goodman’s medical condition had escalated to the point of missing multiple days of work and having to provide a doctor’s slip, Best Buy fired Goodman. It shows that Best Buy regarded him as disabled or a disability risk and acted to remove him from the employment.

Goodman has brought forward sufficient evidence to create genuine issues of material fact with respect to all three prongs of the disability definition. Best Buy’s motion for summary judgment on this ground is not meritorious.

C. Genuine Issues of Material Fact Preclude Summary Judgment that Best Buy’s Proffered Reasons for Terminating Goodman Were Not Pretextual.

Best Buy’s proffered reason for terminating Goodman – excessive absenteeism—appears to be a pretext for discrimination. Summary judgment is improper.

“An employee may meet the burden of persuasion on the issue of pretext by a preponderance of the evidence either by persuading the trier of fact ‘that it is more likely the defendant was racially motivated or that the defendant's proffered

explanation is unworthy of credence.” *Shockency v. Jefferson Lines*, 439 N.W.2d 715, 719 (Minn. 1989); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 809 (Minn. Ct. App. 1992). In making such a showing, the plaintiff may offer evidence of the treatment of the employee and the general policy and practice of the employer towards others. *Lindgren*, 489 N.W.2d at 809. The pretext showing seeks to establish the employer’s reasons for acting against the employee are “phony.” *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034 (8th Cir. 2005). Inconsistent enforcement of policies and practices is evidence that shows pretext. *EEOC v. Kohler*, 335 F.3d 766 (8th Cir. 2003).

Goodman offered evidence that Best Buy manipulated his attendance records so as to put him into the nine absence position when this was not accurate. Goodman explained that he had missed two half days in December of 2004 when he had swapped shifts with a co-worker. These shifts were improperly counted against him under the absence policy. Goodman protested to Best Buy about the problem but Best Buy did not correct the record. When he later reached the ninth absence threshold, Best Buy did not take into account the incorrect absenteeism total. It fired Goodman notwithstanding that he had not reached the nine-absence threshold. It disregarded Goodman’s protest of inaccuracy. All of this happened only after Goodman *for the first time* missed two days in a row for his health. Moreover, all of this happened only after Goodman presented Best Buy with a doctor’s note concerning his health circumstances. This allows a reasonable inference that Best Buy acted to terminate Goodman once his health circumstances

became more serious. This allows an inference of pretext and should be sufficient to withstand summary judgment.

The other inference of pretext is that Best Buy's supervisors failed to follow the Attendance Guidelines in responding to Goodman. Although repeatedly informed by Goodman that his hypertension was causing his absenteeism, neither supervisor ever treated the situation as requiring the special handling appropriate for leaves under FMLA or ADA as required by the Guidelines. An employer cannot shut its eyes to evidence of an employee's disability and ignore its obligations under the MHRA.

An employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.

Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Ore. 1994). *See also Kimbro v. Atlantic Richfield Co.*, 889 F. 2d 869, 877 (9th Cir. 1989)(where supervisor was on notice of employee's medical condition and relationship to absenteeism, employer had an imputed obligation to make a reasonable accommodation inquiry).

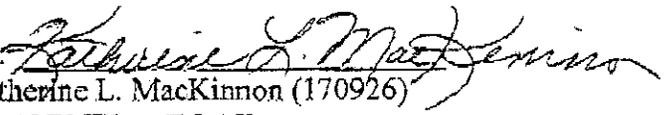
Where, as here, the employer has offered a reason for termination (9 absences) which is inaccurate and where the employer refused the employee's requests to correct the inaccurate record, and where there is evidence that the employer did not act upon information about Goodman's illness and the cause of

his absenteeism, Best Buy's reason for termination is pretextual. Summary judgment would not be proper.

CONCLUSION

Goodman asks this Court to reverse the trial court's dismissal for untimeliness and remand the case for further proceedings on the merits of his case.

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Certificate of Compliance with Minn. R.Civ.App.P. 132.01, subd. 3

The undersigned hereby certifies:

1. This Appellant's Reply Brief and Appendix complies with the word-count limitation of Minn.R.Civ.App.P. 132.01, subd. 3(a)(1) because it contains 6983 words, excluding the parts of the brief exempted from the word-count limitations of this rule.
2. This brief complies with the typeface requirements of Minn.R.Civ.App.P. 132.01, subd. 1 because it was prepared in a proportionally spaced typeface using Microsoft Word 2003 in 13 point, Times New Roman font.