

No. A-07-1820

**STATE OF MINNESOTA
IN THE COURT OF APPEALS**

Jonathan Goodman,

Appellant,

vs.

Best Buy, Inc.,

Respondent.

BRIEF OF RESPONDENT

Katherine L. MacKinnon (Reg. No.
170926)
Law Office of Katherine L. MacKinnon
3744 Huntington Avenue
St. Louis Park, Minnesota 55416
Telephone: (952) 915-9215
FAX: (952) 915-9217

ATTORNEYS FOR APPELLANT

Joseph G. Schmitt, Esq. (Reg. No. 231447)
Halleland Lewis Nilan & Johnson
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 338-1838

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF LEGAL AUTHORITIESiv

STATEMENT OF LEGAL ISSUESviii

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS..... 1

 A. Goodman’s Employment at Best Buy 1

 B. Best Buy’s Attendance Policy2

 C. Goodman’s Poor Attendance, Warnings and Termination.....4

 D. Goodman’s Blood Pressure Condition5

 E. Goodman’s Allegations of Discrimination and FMLA Violation8

 F. Procedural History8

SUMMARY OF ARGUMENT9

ARGUMENT.....10

 A. Standard of Review10

 B. Goodman Was Required to Commence a State Court Action
 Within 30 Days of the Dismissal of His Federal Lawsuit Under
 Section 136711

 C. Goodman’s Equitable Tolling Arguments Should be Rejected19

 1. Goodman’s Equitable Tolling Arguments Should be
 Rejected Because Goodman Did Not Raise Those
 Arguments Below.....19

 2. Goodman May Not Justify His Failure to Comply With
 Section 1367 Based Upon the Doctrine of Paramount
 Authority20

 3. Goodman May Not Rely Upon Equitable Tolling to
 Justify His Failure to Comply With Section 136722

 D. Goodman Has No Valid Claim of Disability Discrimination
 Under the MHRA25

 1. This Court May Affirm the District Court’s Decision on
 Other Grounds.....25

 2. Goodman Cannot Establish a *Prima Facie* Case of
 Disability Discrimination26

 a. Goodman Was Not Disabled27

 b. Goodman Did Not Have a Record of an Impairment.....29

 c. Best Buy Did Not Regard Goodman as Disabled30

3. Goodman Cannot Show that Best Buy’s Reasons for Terminating His Employment Are a Pretext to Conceal Disability Discrimination 32

CONCLUSION 34

TABLE OF LEGAL AUTHORITIES

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Aucutt v. Six Flags Over Mid-America, Inc.</i> , 85 F.3d 1311 (8th Cir. 1996).....	30
<i>EEOC v. Automatic Systems Co.</i> , 169 F. Supp. 2d 1001 (D. Minn. 2001)	29
<i>Garfield v. J.C. Nichols Real Estate</i> , 57 F.3d 662 (8th Cir. 1995).....	18, iv
<i>Hill v. Kansas City Area Transport Authority</i> , 181 F.3d 891 (8th Cir. 1999).....	28, v
<i>Johnson v. Loram Maintenance of Way, Inc.</i> , 83 F. Supp. 2d at 1007 (D. Minn. 2000)	31
<i>Juan v. The Government of Commonwealth of the Northern Mariana Islands</i> , 6 N.M.I. 322, 326-27, 2001 M.P. 18 (2001).....	11, 15, 16, 17, 21
<i>Murphy v. United Parcel Service, Inc.</i> , 527 U.S. 516 (1999).....	28, v
<i>Raygor v. Regents of the University of Minnesota</i> , 534 U.S. 533 (2002).....	18
<i>Spades v. City of Walnut Ridge, Ark.</i> , 186 F.3d 897 (8th Cir. 1999).....	28, v
<i>Taylor v. Nimock's Oil Co.</i> , 214 F.3d 957 (8th Cir. 2000).....	28, v
<i>Webb v. Mercy Hospital</i> , 102 F.3d 958 (8th Cir. 1996).....	31, 32
<i>Weber v. Strippit, Inc.</i> , 186 F.3d 907 (8th Cir. 1999).....	29

STATE CASES

<i>Anderson v. H-Window Co.</i> , 1999 WL 88953 (Minn. App. 1999)	18, iv
<i>Berke v. Buckley Broadcasting Corp.</i> , 359 N.J. Super. 587, 821 A.2d 118 (2003)	11, 15, 16, 21, iv
<i>Black v. Rimmer</i> , 700 N.W.2d 521 (Minn. App. 2005)	23, iv
<i>Bonifeld v. County of Nevada</i> , 94 Cal. App. 4th 298, 114 Cal. Rptr. 2d 207 (2001)	13, iv
<i>Brodsky v. Brodsky</i> , 733 N.W.2d 471 (Minn. App. 2007)	19
<i>Cenaiko Productions, Inc. v. American Alliance Ins. Co.</i> , 1994 Minn. App. LEXIS 296 (Minn. App. 1994)	20, iv
<i>Estate of Fennell v. Stephenson</i> , 528 S.E.2d 911 (N.C. Ct. App. 2000)	12
<i>Fitzgerald v. Fitzgerald</i> , 629 N.W.2d 115 (Minn. App. 2001)	23, iv
<i>Froats v. Froats</i> , 415 N.W.2d 445 (Minn. App. 1987)	21
<i>Harter v. Vernon</i> , 139 N.C. App. 85, 532 S.E.2d 836 <i>appeal dismissed and rev. den.</i> , 353 N.C. 263, 546 S.E.2d 97 (2000), <i>cert. denied</i> , 532 U.S. 1022, 121 S. Ct. 1962, 149 L.Ed.2d 757 (2001)	11, 15, 16, 21
<i>Hoover v. Northwest Private Mortg. Banking</i> , 632 N.W.2d 534 (Minn. 2001)	26
<i>Huang v. Ziko</i> , 132 N.C. App. 358, 511 S.E.2d 305 (1999)	12, 15, 16, 17, 21, iv
<i>Hubbard v. United Press Intern., Inc.</i> , 330 N.W.2d 428 (Minn. 1983)	26

<i>Kendrick v. City of Eureka</i> , 82 Cal. App. 4th 364, 98 Cal. Rptr. 2d 153 (2000).....	11, 13, 21, 24, iv
<i>Knipple v. Lipke</i> , 211 Minn. 238, 300 N.W. 620 (1941).....	20, iv
<i>Kolani v. Gluska</i> , 64 Cal. App. 4th 402, 75 Cal. Rptr. 2d 257 (1998).....	12, 13, 15, 16, 17, 21, iv
<i>Lindgren v. Harmon Glass Co.</i> , 489 N.W.2d 804 (Minn. App. 1992).....	33, v
<i>Lucas v. Muro Pharmaceutical, Inc.</i> , 3 Mass. L. Rep. 113, 1994 Mass. Super. LEXIS 462, *6-8 (Mass. Super. Ct. 1994)	12
<i>Offerdahl v. University of Minn. Hospitals and Clinics</i> , 426 N.W.2d 425 (Minn. 1988).....	10
<i>Peggy Rose Revocable Trust v. Eppich</i> , 640 N.W.2d 601 (Minn. 2002).....	19
<i>Phillips v. City of Dayton</i> , 2000 WL 224887 (Minn. App. 2000)	30
<i>Roden v. Wright</i> , 611 So. 2d 333 (Ala. 1992)	12
<i>Schockency v. Jefferson Lines</i> , 439 N.W.2d 715 (Minn. 1989).....	33, v
<i>Sigurdson v. Carl Bolander & Sons, Co.</i> , 532 N.W.2d 225 (Minn. 1995).....	28
<i>St. Louis Park Post Number 5632 v. City of St. Louis Park</i> , 687 N.W.2d 405 (Minn. App. 2004).....	26
<i>St. Paul, M. & M. Ry. Co. v. Olson</i> , 87 Minn. 117, 119; 91 N.W. 294, 295 (1902)	21
<i>Stansell v. City of Northfield</i> , 618 N.W.2d 814 (Minn. App. 2000).....	26

<i>State v. Mauer</i> , 2007 Minn. LEXIS 679 (Minn. Nov. 15, 2007)	14
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	19
<i>Togstad v. Vesely, Otto, Miller & Keefe</i> , 291 N.W.2d 686 (Minn. 1980).....	22, iv
<i>In re Welfare of S.N.R.</i> , 617 N.W.2d 77 (Minn. App. 2000).....	26
<i>Winkler v. Magnuson</i> , 539 N.W.2d 821 (Minn. App. 1995).....	26

FEDERAL STATUTES

28 U.S.C. § 1367(d).....	14
--------------------------	----

STATE STATUTES

Minn. Stat. § 363A.03.....	27, 28
Minn. Stat. § 645.17	14

STATEMENT OF LEGAL ISSUES

1. Does 28 U.S.C. Section 1367(d) require a plaintiff to commence a state law claim within 30 days after dismissal of that claim without prejudice by a federal court that declines to exercise supplemental jurisdiction over that claim?

The District Court held that the plaintiff is required to assert that claim within 30 days after dismissal of the federal action.

Apposite authorities:

28 U.S.C. Section 1367(d); *Berke v. Buckley Broadcasting Corp.*, 359 N.J. Super. 587, 595, 821 A.2d 118, 123 (2003); *Bonifeld v. County of Nevada*, 94 Cal. App. 4th 298, 114 Cal. Rptr.2d 207 (2001), *rev. denied* (2002); *Huang v. Ziko*, 132 N.C. App. 358, 511 S.E.2d 305 (1999); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 75 Cal. Rptr.2d 257 (1998).

2. Does a dismissal without prejudice in federal court toll the statute of limitations under the paramount authority doctrine?

Goodman did not raise this issue below, and the District Court therefore did not address this question.

Apposite authorities:

Garfield v. J.C. Nichols Real Estate, 57 F.3d 662, 666 (8th Cir. 1995); *Knipple v. Lipke*, 211 Minn. 238, 300 N.W. 620, 622 (1941); *Anderson v. H-Window Co.*, 1999 WL 88953, *2 (Minn. App. 1999); *Cenaiko Productions, Inc. v. American Alliance Ins. Co.*, 1994 Minn. App. LEXIS 296, *5-6 (Minn. App. 1994).

3. Do Minnesota equitable tolling principles allow a plaintiff to assert pendent state law claims that have been dismissed without prejudice in federal court more than 30 days after dismissal of that claim, if the plaintiff is represented by counsel at the time of the dismissal of his or her federal claims?

Goodman did not raise this issue below, and the District Court therefore did not address this question.

Apposite authorities:

Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 694 (Minn. 1980); *Black v. Rimmer*, 700 N.W.2d 521, 527 (Minn. App. 2005); *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001); *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 98 Cal. Rptr.2d 153, 156 (2000).

4. Does Goodman have a disability under the Minnesota Human Rights Act (“MHRA”)?

Although this issue was presented to the District Court below, it ruled for Best Buy on the statute of limitations issue without reaching the substance of Goodman’s claims.

Apposite authorities:

Murphy v. United Parcel Service, Inc., 527 U.S. 516, 518-19 (1999); *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000); *Spades v. City of Walnut Ridge, Ark.*, 186 F.3 897, 900 (8th Cir. 1999); *Hill v. Kansas Cit Area Transp. Authority*, 181 F.3d 891, 894 (8th Cir. 1999).

5. Can Goodman show that Best Buy’s legitimate and nondiscriminatory reasons for terminating his employment were merely a pretext to conceal disability-based discrimination?

Although this issue was presented to the District Court below, it ruled for Best Buy on the statute of limitations issue without reaching the substance of Goodman’s claims.

Apposite authorities:

Schockency v. Jefferson Lines, 439 N.W.2d 715, 719 (Minn. 1989); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 808 (Minn. App. 1992).

STATEMENT OF THE CASE

Best Buy terminated Goodman's employment because he exceeded the number of allowed absences under Best Buy's attendance policy. Goodman acknowledges his absences, admits that he violated Best Buy policy and concedes that he was terminated solely for violation of that policy. Goodman challenged his termination on the grounds that his final absence was allegedly related to high blood pressure. Goodman therefore filed a lawsuit against Best Buy on July 12, 2005, contending that his termination violated the Family Medical Leave Act ("FMLA") and the MHRA.

Goodman's claims were first litigated in federal court. After discovery, Best Buy moved for summary judgment, and on December 4, 2006, the Court dismissed the FMLA claim with prejudice, noted there was no remaining federal question, and dismissed the MHRA claims without prejudice. Over four months later, Goodman filed another complaint in state court under the MHRA. Best Buy moved to dismiss and for summary judgment, alleging that Goodman could not establish a *prima facie* case of discrimination and that his claims were untimely. The District Court granted Best Buy's motion on timeliness grounds and did not reach the substantive merit of Goodman's claims.

STATEMENT OF FACTS

A. Goodman's Employment at Best Buy.

Best Buy hired Goodman on September 30, 2002 as a full-time employee in the Best Buy Customer Call Center. R. App., 35 (Goodman dep. p. 80). Goodman's duties included taking incoming calls regarding various customer issues and, if possible,

resolving those issues. R. App., 71-72 (Antonio dep. pp. 6-7). At the time of his termination, his supervisor was Ivan Antonio. R. App., 68-71 (Antonio dep. pp. 3-6).

Antonio terminated Goodman's employment as a result of excessive absenteeism on February 21, 2005. R. App., 72-75; 28-34 (Antonio dep. pp. 7-10; Goodman dep. pp. 52-58). Antonio told Goodman that his termination was due to Goodman's violation of the Best Buy Customer Call Center attendance policy. R. App., 72-75; 28-34 (Antonio dep. pp. 7-10; Goodman dep. pp. 52-58).

B. Best Buy's Attendance Policy.

The attendance policy applicable to Call Center employees provided that, after an initial 90 days of employment, an employee who was absent six times in a rolling 12-month period received a verbal warning. R. App., 74-75 (Antonio dep. pp. 9-10). An employee who was absent seven times in a 12-month period received a written warning. R. App., 74-75 (Antonio dep. pp. 9-10). Eight absences in a 12-month period resulted in a final warning, and Best Buy terminated the employment of employees who were absent nine times in a 12-month period. R. App., 74-75 (Antonio dep. pp. 9-10).¹

Goodman admitted that he was familiar with the attendance policy and knew that nine unexcused absences would lead to termination. R. App., 12-13; 47-48 (Goodman dep. pp. 21-22, 100-101). At his deposition, Goodman acknowledged that he was absent

¹ The attendance policy permits exceptions for serious illness or other events protected under applicable law. R. App., 147-150 (Attendance Guidelines).

from the workplace nine times in the 12-month period before February 21, 2005. R. App., 14; 47-48 (Goodman dep. pp. 25-26, 100-101).²

The policy required employees who were absent to call Best Buy's attendance line and leave a message stating their employee number, a callback number and whether they would be gone for a full day or a partial day. R. App., 80; 15; 20-24 (Antonio dep. p. 56; Goodman dep. pp. 28, 40-42, 45-46). These calls were handled not by the supervisors themselves but by an operations group. R. App., 80 (Antonio dep. p. 56). The calls were placed on an answering machine and not with a live person. R. App., 20-24 (Goodman dep. pp. 40-42, 45-46).

Employee calls regarding absences were noted by the attendance tracking system. After an absence was recorded, a notice went to the employee and to the employee's supervisor. R. App., 52-53 (Goodman dep. pp. 110-111). This notice was issued so that the employee was aware that an absence had been recorded and could provide additional information or challenge the absence if necessary. R. App., 52-53 (Goodman dep. pp. 110-111). Tardiness was tracked in a similar manner under the attendance policy but was treated separately for purposes of issuing warnings. R. App., 76-77 (Antonio dep. pp. 11-12).

² Goodman's testimony regarding his absences was erratic. While Goodman testified that he was, in fact, absent from work nine times in the 12 months before February 21, he also testified that he could not remember whether he was absent on any of the days listed on his final written warning other than February 18. R. App., 63-66 (Goodman dep. pp. 195-198). Under questioning from his own attorney at his deposition, Goodman testified that he was *not* absent on any of the days listed on his final written warning, including February 18, R. App., 59-62 (Goodman dep. pp. 169-172), even though he also clearly admitted that he did not come to work that day. R. App., 15; 20-24 (Goodman dep. pp. 28, 40-42, 45-46).

C. Goodman's Poor Attendance, Warnings and Termination.

During the approximately two and one-half years of his employment, Goodman received at least six written warnings regarding his absences prior to February 21, 2005. R. App., 112-114; 116-118 (Goodman dep. Exs. 9-11, 13-15). In addition to the six-plus written warnings regarding absences, Goodman received another four written warnings regarding tardiness. R. App., 111; 115; 119-20 (Goodman dep. Exs. 8, 12, 16, 17).

Goodman called into the attendance line on February 18, and again on February 19 to report that he would be absent in accordance with Best Buy procedure. R. App., 15; 20-24 (Goodman dep. poor performance. 28, 40-42, 45-46). Goodman left his name, his employee number and his telephone number on each day. R. App., 15; 20-24 (Goodman dep. poor performance. 28, 40-42, 45-46). Goodman testified that he also included in the message that he was not coming into work because he was "sick." R. App., 34 (Goodman dep. p. 58).

Goodman was not scheduled to work on February 20 and returned to work on February 21. R. App., 25-28 (Goodman dep. poor performance. 48-49, 51-52). He worked a full day that day and was called into a meeting with Antonio at the end of the day. R. App., 25-28 (Goodman dep. poor performance. 48-49, 51-52). Antonio informed Goodman that Best Buy was terminating his employment because he had reached nine absences within a 12-month period. R. App., 10; 28-31; 41-42; 109-110; 81-82 (Goodman dep. poor performance. 20, 52-55, 93-95, Exs. 4-5; Antonio dep. poor performance. 57-58). Antonio provided Goodman with the documentation of his absences. R. App., 29-31 (Goodman dep. poor performance. 53-55).

During the meeting on the 21st, Goodman gave Antonio a doctor's note that said, "Off work until Mon. 2/21/05." R. App., 28-31; 34; 108 (Goodman dep. poor performance. 52-55, 58, Ex. 1). All that Goodman told Antonio was, "I have a doctor's note here." R. App., 28-31; 34; 108 (Goodman dep. poor performance. 52-55, 58, Ex. 1). Goodman did not tell Antonio *why* he was off work on either the 18th or 19th. R. App., 34 (Goodman dep. p. 58). According to Goodman, "We never discussed that." R. App., 34 (Goodman dep. p. 58).

D. Goodman's Blood Pressure Condition.

Goodman has had a history of high blood pressure for over at least ten years. R. App., 90; 138 (Hockett dep. p. 12, Ex. 1 "A").³ Goodman testified that he had been treated for high blood pressure in the past but had been off of his blood pressure medication for some time before he first saw Dr. Hockett on February 17. R. App., 16-19 (Goodman dep. poor performance. 29-32).⁴

Dr. Hockett testified that it is not unusual for him to see patients with hypertension.⁵ R. App., 91-94 (Hockett dep. poor performance. 18-21). As many as 20% of Americans may have hypertension. R. App., 91-94 (Hockett dep. poor performance. 18-21). Hypertension is sometimes referred to as the "silent killer" because a person can have hypertension and not even be aware of it. R. App., 91-94 (Hockett dep. poor

³ Dr. Hockett was Goodman's treating physician and saw him on several occasions between February 18 and June 14, 2005. R. App., 88; 102; 122-146 (Hockett dep. pp. 9, 37, Ex. 1). Dr. Hockett also spoke to Goodman by phone on November 2, 2005. R. App., 103-105 (Hockett dep. pp. 38-40). Dr. Hockett was designated by Goodman as an expert witness to be called to testify during Goodman's case in chief.

⁴ The testimony regarding Goodman's first visit to see Dr. Hockett was inconsistent. Goodman testified that he saw Dr. Hockett on February 17 and, later, called into work sick on February 18. Dr. Hockett's notes and his testimony were that Goodman saw him for the first time on February 18. R. App., 89; 138 (Hockett dep. p. 10, Ex. 1 "A").

performance. 18-21). Dr. Hockett acknowledged that hypertension is treatable with medication. R. App., 91-94 (Hockett dep. poor performance. 18-21).

Goodman admitted that he was able to work during the months leading up to his appointment with Dr. Hockett. R. App., 36 (Goodman dep. p. 83). Moreover, Goodman testified that he was able to handle his work correctly. R. App., 36 (Goodman dep. p. 83). Goodman also conceded that he was able to carry on a normal work life despite his high blood pressure. R. App., 37-40 (Goodman dep. poor performance. 88-91). He acknowledged that there was no work he was unable to do because of his high blood pressure. R. App., 37-40 (Goodman dep. poor performance. 88-91).

Dr. Hockett testified that he diagnosed Goodman with hypertension on February 18, 2005. R. App., 96; 138 (Hockett dep. p. 24, Ex. 1 "A"). Dr. Hockett noted that a person with hypertension would not need to miss work because of that condition. R. App., 96; 138 (Hockett dep. p. 24, Ex. 1 "A").

Dr. Hockett nevertheless claimed that he gave Goodman a note regarding taking a couple of days off of work. R. App., 96-98 (Hockett dep. poor performance. 24-26). Dr. Hockett could not remember, however, if this was because of Goodman's request for such a note. R. App., 96-98 (Hockett dep. poor performance. 24-26). Dr. Hockett admitted that he could not recall the reason that he wrote the note. R. App., 96-98 (Hockett dep. poor performance. 24-26).

⁵ High blood pressure and hypertension are different names for the same condition. R. App., 106 (Hockett dep. p. 42).

Dr. Hockett testified that, in his opinion, Goodman was not impaired from returning to work because of hypertension. R. App., 98-99 (Hockett dep. poor performance. 26-27). Further, Dr. Hockett conceded that Goodman did not have any limits on his work activities because of his hypertension, R. App., 98-99 (Hockett dep. poor performance. 26-27), and that there were no restrictions on Goodman when he returned to work. R. App., 98-99 (Hockett dep. poor performance. 26-27).

Dr. Hockett also testified that, in his opinion, Goodman was not limited from leading a normal, active life because of his hypertension. R. App., 99-100 (Hockett dep. poor performance. 27-28). Dr. Hockett discussed some “basic dietary measures and physical activity recommendations, such as routine exercise” with Goodman, but did not ever put any restrictions on Goodman’s daily activities because of hypertension. R. App., 107 (Hockett dep. p. 49). Dr. Hockett also testified that there were no particular activities that he felt Goodman should stay away from. R. App., 101; 25 (Hockett dep. p. 30; Goodman dep. p. 48).

Goodman could not say that any of the absences in his discharge paperwork, including his final written warning, were connected to his high blood pressure condition other than the absences of February 18 and 19. R. App., 44-47 (Goodman depo. poor performance. 97-100).

Goodman claimed that he had mentioned the existence of his high blood pressure condition, as well as some lingering back problems that he had, in conversations with both Ms. Ahmed and Antonio. R. App., 49; 50; 54-55 (Goodman depo. poor performance. 104, 108, 116-117). Goodman contended that he mentioned these

conditions to some of his co-workers as well. R. App. 49, 50, 54-55 (Goodman dep. poor performance. 104, 108, 116-117). Goodman also admitted, however, that he never told any of these individuals that he had to be away from work due to his high blood pressure condition. R. App., 50-51; 55 (Goodman dep. poor performance. 108-109, 117).

E. Goodman's Allegations of Discrimination and FMLA Violation.

Goodman initially claimed that his discharge on February 21, 2005 was illegal disability discrimination and in violation of his FMLA rights. R. App., 3-6 (Goodman dep. pp. 12-15). He testified that he does not believe that he had sufficient absences to be terminated or that his attendance warranted discharge. R. App., 11 (Goodman dep. p. 21). He claimed that the absence of February 18 should not have counted against him because of his high blood pressure condition. R. App., 45-48 (Goodman dep. pp. 98-101).

F. Procedural History.

Goodman first alleged FMLA and MHRA claims against Best Buy on July 12, 2005. Best Buy removed the claim to federal court. The parties conducted discovery, and United States District Court Judge David S. Doty dismissed Goodman's FMLA claims on December 4, 2006. Judge Doty also declined to exercise supplemental jurisdiction over the MHRA claims. Goodman eventually decided to commence a state court action based upon the MHRA claim on March 9, 2007. Best Buy moved to dismiss those claims and for summary judgment. The District Court granted that motion, and Goodman now brings this appeal.

SUMMARY OF ARGUMENT

The District Court correctly determined that Goodman's claims are untimely. It is black letter law in Minnesota that a dismissal without prejudice does not toll the statute of limitations. This bedrock principle is modified by 28 U.S.C. Section 1367(d) ("Section 1367(d)") only to permit a plaintiff to file a state law claim within 30 days of dismissal of that claim in federal court. Virtually all courts to address this issue (including nine courts in six jurisdictions) have rejected Goodman's contention that Section 1367(d) converts a dismissal without prejudice into an event that stops the statute of limitations. These courts have reasoned that the statutory language, commentary and intent is clear – to grant a brief grace period to allow a plaintiff to refile a case if he or she so desires – and that to restart the clock would result in lengthy delays (as has already occurred in this case). The District Court correctly rejected Goodman's argument, which Goodman based upon a single California state court decision, and the District Court's decision should be affirmed.

Goodman evidently recognizes the strength of the District Court's decision regarding appropriate interpretation of Section 1367(d), as he now seeks to escape that decision by raising new tolling arguments on appeal. These arguments should be rejected because they were not presented to the District Court. Moreover, Goodman has no justification for his failure to commence this lawsuit in a timely manner, ignores the fact that he was represented by counsel at the time of the dismissal of his federal claim, and did not act diligently to commence his lawsuit in state court. These tolling arguments should be rejected.

It is also clear, once again, that Goodman has no valid substantive claims. Best Buy has identified the clear and obvious flaws in Goodman's claims on two previous occasions. Goodman now takes the extraordinary step of arguing that the substantive claims are not relevant on appeal – a clear indication that he recognizes the weakness of those claims. Goodman's argument ignores the fact that this Court has repeatedly held that it may affirm a claim on a basis other than that identified by the District Court. Goodman may not escape the substantive weakness of his claims. The District Court's decision should be affirmed.

ARGUMENT

A. Standard of Review.

Goodman has appealed from a grant of summary judgment in favor of Best Buy. On appeal, it is the function of this Court to determine whether there are any issues of material fact or whether the trial court erred as a matter of law. *Offerdahl v. University of Minn. Hosps. and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). Interestingly, Goodman states that “issues of equitable tolling” are reviewed under an “abuse of discretion” standard. Appellant's Brief, p. 4. Goodman contends that “the state trial court did not rule on equitable tolling and is owed no discretion.” *Id.* In fact, when legal issues (including equitable tolling) are resolved at summary judgment, such issues are reviewed under a *de novo* standard. *Offerdahl*, 426 N.W.2d at 427. This Court should therefore analyze the District Court's decision based upon a *de novo* standard. However, Goodman's concession that he did not raise the equitable tolling arguments below is

nevertheless significant. As discussed in detail *infra*, this Court has repeatedly held that it will not address issues that were not raised before the District Court.

B. Goodman Was Required to Commence a State Court Action Within 30 Days of the Dismissal of His Federal Lawsuit Under Section 1367.

The District Court properly held that Goodman's claims were untimely because he failed to comply with the provisions of Section 1367(d). Section 1367(d) requires a plaintiff such as Goodman to file state claims in state court within 30 days following the dismissal of those claims without prejudice in federal court.

Goodman now contends that Section 1367(d) provides far more than 30 days following dismissal of a federal claim to commence a state court action. Under Goodman's theory, Section 1367(d) suspends the expiration of the statute of limitations for the entirety of the federal litigation, allowing him all of the time remaining on a state statute of limitations, plus 30 days. This Court should adopt the District Court's interpretation of Section 1367(d) and reject Goodman's interpretation for several reasons.

Initially, virtually all courts to address this issue have rejected Goodman's interpretation and have held that a state law claim must be commenced within 30 days following the dismissal of the federal claims under Section 1367(d). *See Berke v. Buckley Broadcasting Corp.*, 359 N.J. Super. 587, 821 A.2d 118, 123 (2003); *Juan v. The Government of Commonwealth of the Northern Mariana Islands*, 6 N.M.I. 322, 326-27, 2001 M.P. 18 (2001); *Harter v. Vernon*, 139 N.C. App. 85, 532 S.E.2d 836, 841-42, *appeal dismissed and rev. den.*, 353 N.C. 263, 546 S.E.2d 97 (2000), *cert. denied*, 532 U.S. 1022, 121 S. Ct. 1962, 149 L.Ed.2d 757 (2001); *Kendrick v. City of Eureka*, 82 Cal.

App. 4th 364, 98 Cal. Rptr.2d 153, 156 (2000); *Huang v. Ziko*, 132 N.C. App. 358, 361, 511 S.E.2d 305, 308 (1999); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410-11, 75 Cal. Rptr.2d 257 (1998).

Six courts, in four different jurisdictions, have all interpreted Section 1367(d) to require plaintiffs such as Goodman to commence an action within 30 days of the dismissal of their federal claims. Each of these courts has specifically rejected Goodman's interpretation of Section 1367(d) and endorsed the District Court's interpretation of this statutory provision.

However, this tally understates the consensus in favor of the District Court's interpretation. A number of other courts have also endorsed the District Court's conclusion even though those courts did not actually dismiss claims as untimely pursuant to Section 1367(d). *See, e.g., Estate of Fennell v. Stephenson*, 528 S.E.2d 911, 914 (N.C. Ct. App. 2000) (refiling timely for purposes of Section 1367(d) because plaintiff filed within 30 days after Federal Court of Appeals' decision affirming District Court's dismissal); *Lucas v. Muro Pharmaceutical, Inc.*, 3 Mass. L. Rep. 113, 1994 Mass. Super. LEXIS 462, *6-8 (Mass. Super. Ct. 1994) (plaintiff's complaint was timely filed pursuant to Section 1367(d) because it was brought within 30 days of appellate ruling); *Roden v. Wright*, 611 So.2d 333, 333 (Ala. 1992) (refiling conformed with Section 1367(d) because party had reasserted claims within 17 days after dismissal). These three courts were not forced to dismiss a claim because the plaintiff filed within 30 days, but their discussion assumes that the plaintiffs in question had 30 days to commence their claims pursuant to Section 1367(d), not the time remaining on the statute of limitations. As a

result, nine courts in six jurisdictions interpreting Section 1367(d) have agreed with the District Court and rejected (implicitly or explicitly) Goodman's interpretation.

Goodman, on the other hand, relies upon a single decision by a California court -- *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 114 Cal. Rptr.2d, 207, 211 (2001). Of course, Goodman's reliance upon *Bonifield* is particularly problematic given that two other California appellate decisions have concluded that Section 1367(d) requires a plaintiff such as Goodman to commence an action within 30 days. *See Kendrick*, 98 Cal. Rptr.2d at 156; *Kolani*, 75 Cal. Rptr.2d at 261-62. Moreover, Goodman provides no explanation as to why the *Bonifield* court's analysis is superior to that of all of the other courts to address this issue. In fact, as discussed *infra*, the majority position is much more consistent with the statutory language, commentary and underlying principles than Appellant's position. At the very most, Goodman may argue that one of the six jurisdictions to consider the issue is conflicted regarding the appropriate interpretation of Section 1367(d); the other five jurisdictions have rejected Goodman's interpretation. The District Court was certainly correct that the consensus of authority supports a narrow interpretation of Section 1367(d).

Second, the District Court's interpretation of Section 1367(d) is consistent with the language of the statute. Section 1367(d) provides as follows:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.

28 U.S.C. § 1367(d) (emphasis added). Goodman contends that this language supports his interpretation that the statute of limitations is suspended for the entire duration of the federal action. This interpretation, however, ignores both the 30-day period and the final phrase of the provision. There 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. Moreover, the statute specifically notes that a plaintiff may commence a claim within a specific time period “unless state law provides for a longer tolling period.” 28 U.S.C. § 1367(d).

Goodman’s interpretation would simply read this phrase out of the statute -- according to Goodman, state law would always provide for a longer tolling period (the state statute of limitations). Goodman cannot explain the inclusion of this language. Minnesota courts discourage statutory constructions that render portions of a statute superfluous. *State v. Mauer*, 2007 Minn. LEXIS 679, *18 (Minn. Nov. 15, 2007). *See also* Minn. Stat. § 645.17. Furthermore, as discussed in more detail *infra*, various state legislatures have actually followed this suggestion and adopted longer tolling periods – further illustrating the degree to which Goodman’s interpretation is inconsistent with both the statutory language and various state courts’ and legislatures’ interpretations of that language.

Goodman argues that the language of the statute supports his interpretation, relying upon the use of the word “toll” in Section 1367. According to Goodman, this means that the statute of limitations restarts after the dismissal. This begs the question, however. 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. The District Court followed the latter course, as have nearly all courts to address this question. As the Superior Court of New Jersey reasoned in *Berke*:

Despite its ambiguous use of the word “tolling,” we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit. Rather, we are satisfied that the “tolling” provision of the statute refers to the period between the running of the statute where the action is pending in federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction. Hence the import of the statute is simply to toll the running of the state statute of limitations from its customary expiration date until the expiration of a thirty-day period following conclusion of the federal action, that is, to provide a thirty-day grace period.

821 A.2d at 123-24. *See also Juan*, 6 N.M.I. at 326-27; *Huang*, 511 S.E.2d at 308;

Kolani, 75 Cal. Rptr.2d at 261; *Harter*, 532 S.E.2d at 841-42. Goodman never

acknowledges the different possible interpretations of this language, and therefore bases his statutory construction argument on a faulty premise.

Third, the Commentary to Section 1367 rejects Goodman’s argument. The practice Commentary accompanying Section 1367 specifically advises plaintiffs such as Goodman to file their state law claims 30 days after the district court’s dismissal, instead of calculating the length remaining on the state statute of limitations. The Commentary provides as follows:

Subdivision (d) of Section 1367 recognizes the serious statute of limitations problems a claim may face after it has been “declined” in a federal action. It may now be too late under the state statute of limitations to bring a state action on the claim. Subdivision (d) answers this dilemma by assuring that the claim shall have at least a 30-day period for the state action after it is dismissed by the federal court.

...

Sometimes a state statute will address the situation and afford an even more general time period for commencement than the 30 days supplied by

Section 1367. If it does, subdivision (d) defers to it, allowing the longer period. New York, for example, is among the states that allow for a longer time.

Commentary on 1988 Revision, 28 U.S.C.A. Section 1367(d). The Commentary expressly endorses the use of a 30-day grace period, and not a reference back to the original statute of limitations. Indeed, the fact that the Commentary notes that “[i]t may now be too late under the state statute of limitations to bring a state action on the claim” confirms that there should be no reference back to the original statute of limitations. *Id.* Moreover, the Commentary highlights the inconsistency between Goodman’s interpretation and the statutory language itself – as previously noted, the fact that various state legislatures have adopted provisions enlarging the 30-day period confirms that the plaintiff does not also receive the benefit of the original statute of limitations.

Fourth, Goodman’s argument is inconsistent with the purpose of the statute.

Section 1367 was adopted “only to preserve a plaintiff’s right of access to the state court for a minimum 30-day period in order for it to assert those state causes over which the federal court declined to exercise jurisdiction and as to which the statute of limitations has run before that declination.” *Berke*, 821 A.2d at 123. “The rule which [Goodman] would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims.” *Huang*, 511 S.E.2d at 308. *See also Juan*, 6 N.M.I. at 326 (rejecting Goodman’s interpretation of Section 1367(d) in part because it would “defeat the policy of statutes of limitations favoring the prompt prosecution of legal claims”); *Kolani*, 75 Cal. Rptr.2d at 261 (rejecting Goodman’s interpretation of Section 1367(d) because it “does significant harm to the statute of limitations policy”). As these Courts have each

recognized, Section 1367(d) already grants sufficient time to commence a claim – ignoring the entirety of the time spent in federal court would do violence to the policies behind statutes of limitations. Indeed, it is important to note that federal litigation can last two, three or even more years; under Goodman’s interpretation of Section 1367(d), in the case of a standard six-year statute of limitations, a Minnesota defendant could find itself haled into court a decade after the claim arose. Courts have rejected Goodman’s interpretation to prevent precisely this result.

Fifth, Goodman’s construction of this provision is inconsistent with established principles regarding dismissals without prejudice. As the California Court of Appeals explained in *Kolani*:

This construction is unreasonable. Such a construction is not needed to avoid forfeitures, because 30 days is ample time for a diligent plaintiff to refile his claims and keep them alive. Further, such a construction does significant harm to the statute of limitations policy. The Supreme Court said in *Wood v. Elling Corp.*, 20 Cal.3d 353, 359: “The law of California is consistent with what has been said to be the rule in the majority of jurisdictions. In the absence of a statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him...”

64 Cal. App. 4th at 402 (quotation omitted). *See also Huang*, 511 S.E.2d at 308

(rejecting Goodman’s interpretation in part because it is contrary to the general rule that “a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him”) (*quoting* 51 Am. Jur. 2d *Limitation of Actions* Section 311 (1970)); *Juan*, 6 N.M.I. at 326 (rejecting

Goodman's theory as contrary to principles regarding dismissals without prejudice). Minnesota has adopted the same principles as these other jurisdictions, and it is well established under Minnesota law that "[d]ismissal without prejudice operates to leave the parties as if no action had been brought at all." *Anderson v. H-Window Co.*, 1999 WL 88953, *2 (Minn. App. 1999). When a claim is dismissed without prejudice under Minnesota law, "the statute of limitations is deemed not to have been suspended during the period in which the suit was pending." *Id.* See also *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995) ("A dismissal without prejudice does not toll a statute of limitations. Indeed, its effect is just the opposite. Once a dismissal without prejudice is entered and the pending suit is dismissed, it is as if no suit had ever been filed."). Goodman's interpretation would violate this well-settled principle of Minnesota law.

Sixth, Goodman's contention that the United States Supreme Court has endorsed his interpretation of Section 1367(d) is misplaced. Goodman argues that the Supreme Court's decision in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 542 (2002), implicitly supports his interpretation of Section 1367(d). Goodman contends that the Supreme Court's statement that Section 1367(d) tolls the "state statute of limitations for 30 days in addition to however long the claim had been pending in federal court" means that a plaintiff receives the full benefit of the state statute of limitations. Appellant's Brief, p. 9. However, this begs the question, once again, of the meaning of the term tolls. The Supreme Court's statement may be read two ways: as Goodman reads it or as simply saying that the statute of limitations may not expire during the

pendency of the federal claim, because the plaintiff has 30 days after dismissal of that claim to assert a claim in state court.⁶ The latter interpretation, of course, is consistent with the District Court's conclusion, as well as that of nine other courts in six other jurisdictions, the language of the statute, the Commentary and the principles underlying the Statute.

For all of these reasons, this Court should join the consensus position and reject Appellant's interpretation of Section 1367(d).

C. Goodman's Equitable Tolling Arguments Should be Rejected.

1. Goodman's Equitable Tolling Arguments Should be Rejected Because Goodman Did Not Raise Those Arguments Below.

Goodman further reveals the weakness of his Section 1367(d) arguments by asserting new tolling arguments on appeal. As an initial matter, this Court should reject all of Goodman's tolling arguments because Goodman did not raise those arguments before the District Court. This Court has held that "we will not address an issue not properly raised before the District Court." *Brodsky v. Brodsky*, 733 N.W.2d 471, 478 (Minn. App. 2007). *See also Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 609, n.10 (Minn. 2002) ("we join the Court of Appeals in rejecting seller's argument that the issue whether the contractual limitations period was reasonable is not properly before the Court on appeal because it was not raised in the District Court"); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reversing a Court of Appeals decision in part because "the Court of Appeals improperly considered a statute of limitations question never

⁶ Notably, the limitations periods in *Raygor* had expired even under Goodman's construction of Section 1367(d); hence, it is unlikely that the Supreme Court in *Raygor* even faced the issue presented in this appeal.

litigated below”). In this case, Goodman never raised these tolling issues before the District Court and should not be permitted to present such arguments on appeal.

2. Goodman May Not Justify His Failure to Comply With Section 1367 Based Upon the Doctrine of Paramount Authority.

Goodman’s first effort to evade Section 1367(d) relies upon the doctrine of paramount authority. Goodman’s paramount authority argument is flawed for several reasons.

Initially, the doctrine of paramount authority has been applied to address situations in which a plaintiff is precluded from commencing an action during the expiration of a statute of limitations. *See Knipple v. Lipke*, 211 Minn. 238, 300 N.W. 620, 622 (Minn. 1941) (to justify application of paramount authority doctrine “plaintiff must show that he was prevented from timely procedure in this suit ‘by some paramount authority’”); *Cenaiko Productions, Inc. v. American Alliance Ins. Co.*, 1994 Minn. App. LEXIS 296, *5-6 (Minn. App. 1994) (tolling permissible only “where a paramount authority or a situation of invincible necessity prevents a plaintiff’s timely procedure”). In this case, of course, Section 1367(d) provides a 30-day grace period to avoid precisely this problem. Goodman’s arguments neatly illustrate why Section 1367(d) was adopted.

Goodman provides no authority to support the proposition that the doctrine of paramount authority may be applied when a party has the opportunity to commence litigation but elects not to take advantage of that opportunity. Instead, the cases cited by Goodman merely confirm the general principle that a statute of limitations may not expire while a person is unable to bring suit – which, as previously noted, is exactly the

principle embodied in Section 1367(d). *See St. Paul, M. & M. Ry. Co. v. Olson*, 87 Minn. 117, 119; 91 N.W. 294, 295 (1902); *Froats v. Froats*, 415 N.W.2d 445, 446-47 (Minn. App. 1987). Indeed, Goodman essentially concedes this principle in his brief, noting that “for Goodman to emerge from the federal court proceeding having lost his right to bring a new state court action and vindicate his rights under the MHRA is absurd and unfair...” Appellant’s Brief, p. 18. Goodman omits to mention the fact that he did not emerge from the federal action unable to commence a suit under the MHRA: Section 1367(d) specifically allowed him to commence such a suit. Goodman merely allowed the time for such a suit to expire. His decision not to file within the-30 day period is not excused by the doctrine of paramount authority.

In addition, Goodman’s argument is inconsistent with Section 1367(d) itself and has been explicitly rejected by numerous courts across the United States. As previously noted, Section 1367(d) specifies the time period after dismissal of the federal action within which a plaintiff may file suit. Goodman’s suggestion that the doctrine of paramount authority allows him to bring suit beyond that time period is inconsistent with the statutory text. Moreover, none of the many courts in a variety of jurisdictions to address this issue have accepted an argument of tolling based upon paramount authority to avoid the clear intent of Section 1367. *See Berke*, 821 A.2d at 123; *Juan*, 6 N.M.I. at 326; *Harter*, 532 S.E.2d at 841-42; *Kendrick*, 98 Cal. Rptr.2d at 156; *Huang*, 511 S.E.2d at 308; *Kolani*, 75 Cal. Rptr.2d at 261. Goodman’s effort to rely upon paramount **authority should be rejected by this Court as well.

3. Goodman May Not Rely Upon Equitable Tolling to Justify His Failure to Comply With Section 1367.

Goodman next argues that equitable tolling justifies his failure to bring suit within 30 days. Goodman seeks to justify his behavior by arguing that (1) he was not on notice of the deadline, and was acting *pro se*; (2) the law was unclear regarding the correct application of Section 1367; and (3) the federal court did not advise him of the 30-day deadline. Goodman also argues that he has been diligent in his prosecution of this suit and that Best Buy would not be prejudiced if he were allowed to proceed with this action. None of Goodman's arguments have merit.

Initially, it is important to note that Goodman must demonstrate some justification for equitable tolling beyond mere diligence and lack of prejudice. Goodman suggests that these two factors alone are sufficient to excuse a failure to comply with the statute of limitations. However, every plaintiff can argue diligence and a lack of prejudice; there must also be some predicate act justifying the failure to commence a claim within the statute of limitations. In this case, Goodman lacks any such predicate fact.

Second, and contrary to Goodman's suggestion, he was not *pro se* during the critical time period at issue in this case. Goodman was represented by counsel during the pendency of the federal court action and thereafter. At some point after the federal claim was dismissed, Goodman and his lawyer parted ways. However, counsel has an obligation under such circumstances to advise their soon-to-be former clients regarding applicable deadlines. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 694 (Minn. 1980). The appropriate remedy if a client is not advised of such a deadline is not

tolling of the deadline, but rather a malpractice action against the former attorney. In this case, the very most that Goodman may demonstrate is that he has a cause of action against his former counsel. Furthermore, contrary to Goodman's suggestion, "*pro se* litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). *See also Black v. Rimmer*, 700 N.W.2d 521, 527 (Minn. App. 2005) (same). None of Goodman's arguments justify modifying the statute of limitations or allowing him to proceed with a claim against Best Buy.

Third, Goodman's suggestion that the law is unclear is false. As previously noted, nine courts in six jurisdictions have all held that a plaintiff must commence a claim within 30 days following the dismissal of a federal action under Section 1367(d). Goodman, after diligently searching for contrary authority, has found a single case from a Court of Appeals in California (a state in which two other appellate courts have reached the opposite conclusion). Goodman's suggestion that the law is extremely unsettled in this area is simply a legal fiction.

Fourth, courts have explicitly addressed the issue of such "confusion" in the context of efforts to avoid the operation of Section 1367(d) and held such arguments to be unpersuasive. As the California Court of Appeal observed in *Kendrick*:

Appellants argue "they should not be forced to forfeit their pendent state claims because of a conflict of rules and/or an uncharted area of the law has been reached." However, Appellants were given ample express warning that the state statute of limitations might preclude their state claims if they did not file them as soon as 30 days after their claims were dismissed by the District Court. For example, the practice commentary accompanying 28 United States Code Section 1367 in the United States Annotated Code

specifically advised Appellants to file their state law claims 30 days after the District Court's dismissal. (Practice Commentary, 28 U.S.C.A. (1993) foll. § 1367, pp. 829, 836 ["the dismissal moment should be taken to be the moment of dismissal in the District Court. Even if an appeal is taken to a Court of Appeals ... the party whose claim has been dismissed ... does best to commence the state action within the prescribed time measured from the District Court dismissal ..."].)

98 Cal. Rptr.2d at 158. In fact, in *Kendrick* the plaintiff faced a more confusing area than that addressed by Goodman in this case: the plaintiff sought to determine whether to commence the action within 30 days of the district court's dismissal or 30 days after the appellate court's dismissal. Moreover, the plaintiff in *Kendrick* did not have the benefit of decisions rendered after 2000, which have further solidified the consensus of authority in this area. Despite these additional complications, the Court of Appeals held that tolling was inappropriate based upon a legal confusion argument. Goodman's argument should be rejected for precisely the same reasons here.

Fifth, Goodman's suggestion that the federal court is to blame for his failure to timely commence his claim is baseless. The federal court is under no duty to conduct Goodman's counsel's research regarding the statute of limitations. As previously noted, Goodman's remedy for improper advice regarding the statute of limitations is to file a claim against his counsel, not to blame the federal court.

Sixth, Goodman's suggestion that he acted diligently is also false. Goodman's state law complaint is virtually identical to his federal complaint. Goodman was not required to do research or drafting -- he simply needed to change the caption, alter a few words, and deliver the complaint to Best Buy. His failure to perform these extremely simple tasks within 30 days destroys his claim of diligence.

Finally, Goodman is incorrect that there will be no prejudice to Best Buy. Best Buy has already litigated this case once. Best Buy has briefed the merits of Goodman's MHRA claim to two different courts. Nearly three years have passed since the termination of Goodman's employment. The Minnesota state legislature established a one-year statute of limitations for discrimination claims for a reason: recollections fade, circumstances change and it is difficult to reconstruct employment decisions years after the fact. Congress established short statutes of limitations for federal discrimination claims for the same reason. Goodman's suggestion that Best Buy will suffer no prejudice if he is allowed to litigate his claims years after his termination has been rejected by Congress and the Minnesota legislature. Goodman's equitable tolling arguments should be rejected by this Court as well.

D. Goodman Has No Valid Claim of Disability Discrimination Under the MHRA.

1. This Court May Affirm the District Court's Decision on Other Grounds.

Goodman takes the extraordinary step of arguing that this Court should not consider the merits of his claim on appeal. Appellant's Brief, p. 23. Goodman references the general rule that new issues should not be raised on appeal. Of course, as previously noted, Goodman himself violates this rule by raising new equitable tolling and paramount authority arguments on appeal. Those tolling and paramount authority arguments should be rejected for precisely the reasons articulated by Goodman in this section of his Brief.

Moreover, although Goodman is correct that this Court does not generally consider new issues on appeal, the Court has held, in the summary judgment context, that

it is appropriate to affirm a grant of summary judgment on an issue presented to the district court even if the district court did not grant summary judgment on that basis below. An award of summary judgment will be affirmed, “if it can be sustained on any ground.” *St. Louis Park Post No. 5632 v. City of St. Louis Park*, 687 N.W.2d 405, 409-10 (Minn. App. 2004). *See also Stansell v. City of Northfield*, 618 N.W.2d 814, 818 (Minn. App. 2000); *In re Welfare of S.N.R.*, 617 N.W.2d 77, 85 n.5 (Minn. App. 2000); *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995). This principle is particularly appropriate in this case, given that Best Buy has consistently maintained that Goodman’s claims fail on their merits throughout the proceedings before the District Court below and in the federal district court. Best Buy reiterates that position before this Court, and these merits-based infirmities provide additional grounds for affirming the District Court’s grant of summary judgment for Best Buy.

2. Goodman Cannot Establish a *Prima Facie* Case of Disability Discrimination.

Initially, Goodman’s claims are legally infirm because Goodman cannot establish a *prima facie* of disability discrimination. To establish a *prima facie* case of disability discrimination, Goodman must show (1) that he has a disability within the meaning of the MHRA, (2) that he is qualified to perform the essential functions of the job, with or without a reasonable accommodation, and (3) that he suffered an adverse employment action because of his disability. *Hoover v. Northwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001); *Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 442 (Minn. 1983). The first requirement requires evidence that Goodman “has a

physical, sensory, or mental impairment that materially limits one or more of his major life activities; that he has a record of such impairment; or that he is regarded by the employer as having such an impairment.” Minn. Stat. § 363A.03, subd. 12. Goodman did not present any evidence to the District Court that he was disabled, under any definition.

a. Goodman Was Not Disabled.

Goodman failed to present any evidence below that his high blood pressure materially limited his ability to perform any major life activity. More specifically, Goodman presented no evidence that he was materially limited in his ability to care for himself, perform manual tasks, walk, see, hear, breathe or work. To the contrary, the record contains overwhelming evidence that Goodman’s high blood pressure *did not* materially limit his ability to perform a major life activity.

Dr. Hockett examined Goodman on February 18, 2005. After examining Goodman, Dr. Hockett did not place any restrictions on Goodman’s activities. R. App., 101 (Hockett dep. p. 30). In fact, Dr. Hockett told Goodman that he should be more active, by engaging in routine exercise. R. App., 107 (Hockett dep. p. 49). Dr. Hockett testified that Goodman’s high blood pressure did not restrict him in any daily activities. R. App., 101 (Hockett dep. p. 30). Dr. Hockett testified that there were no particular activities Goodman could not do as a result of his high blood pressure. R. App., 101; 107 (Hockett dep. internal investigation. 30, 49). And, Dr. Hockett testified that Goodman’s high blood pressure did not limit him, in any way, from leading a normal, active life. R.

App., 99 (Hockett dep. p. 27). Clearly, Goodman's high blood pressure did not materially limit him in the performance of a major life activity.

There is more. The evidence shows that Goodman's high blood pressure was controlled by medication. Goodman's February 24, 2005 medical record stated that Goodman "denies any side effects from the medication" and that "his chest pain and headaches have resolved." R. App., 136 (Goodman 2/24/05 Medical Record). The medical record also stated that Goodman was "feeling healthy." *Id.* The determination of whether one is disabled must be made with reference to "mitigating measures such as medication." *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000). "A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently [materially] limits a major life activity." *Spades v. City of Walnut Ridge, Ark.*, 186 F.3d 897, 900 (8th Cir. 1999). Here, Goodman's medical records show that Goodman's high blood pressure was controlled by medication. *See Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 518-19 (1999) (holding that the plaintiff who had high blood pressure was not disabled, because his high blood pressure condition was controlled by medication); *Hill v. Kansas City Area Transp. Authority*, 181 F.3d 891, 894 (8th Cir. 1999) (holding that plaintiff's "hypertension is not a disability because 'when medicated [her] high blood pressure does not substantially limit [her] in a major life activity'"); *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 229 (Minn. 1995) ("Sigurdson's ability to work has not been greatly impeded by his diabetes since he has been able to obtain and retain employment for most of his adult years").

Since Goodman's high blood pressure was controlled by medication, Goodman was not disabled.

Goodman presented no evidence that his high blood pressure materially limited a major life activity. Consequently, Goodman does not meet the first definition of a disabled person.

b. Goodman Did Not Have a Record of an Impairment.

Goodman also failed to present any evidence to the District Court that he had a record of impairment. Goodman claimed that he has had high blood pressure for at least ten years. R. App., 37 (Goodman dep. p. 88). But, merely having high blood pressure for several years does not establish a "record of impairment." *EEOC v. Automatic Systems Co.*, 169 F.Supp.2d 1001, 1006 (D. Minn. 2001) (holding that plaintiff's well-known history of heart problems was insufficient to establish a record of disability). To have a record of impairment, an employee must have a history of a mental or physical impairment that *materially limits one or more major life activities*. *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 1999). Goodman introduced no evidence here that his high blood pressure ever materially limited a major life activity -- much less that he has a history of high blood pressure that materially limited a major life activity.

Goodman lived and worked normally throughout the more than ten years he has had high blood pressure. There is no evidence in the record that Goodman's high blood pressure prevented him from performing any daily activities. Furthermore, Goodman has not (and cannot) identify a single action or activity that he was unable to perform because of his high blood pressure. Goodman testified that his high blood pressure "is a condition

that's always treats itself when it comes." R. App., 23 (Goodman dep. p. 45). In fact, Goodman stopped taking his high blood pressure medication. R. App., 36 (Goodman dep. p. 83). He controlled his high blood pressure for years by merely "calming down" and "relaxing." R. App., 16-17; 36 (Goodman dep. poor performance. 29-30, 83). His symptoms were so controlled that, when he went to the doctor on February 17, it did not even occur to him that his issues were related to high blood pressure. R. App., 19 (Goodman dep. p. 32). Simply put, there is no evidence in the record that Goodman had a history of high blood pressure that materially limited a major life activity.

Goodman does not satisfy the second definition of a disabled person, because there is no evidence that he had a record of impairment.

c. Best Buy Did Not Regard Goodman as Disabled.

Finally, Goodman also presented no evidence to the District Court that he was "regarded as" disabled by Best Buy. Goodman claimed that, at some unknown point, he mentioned his high blood pressure to Antonio,⁷ his supervisor. R. App., 49 (Goodman dep. p. 104). But, "mere awareness by supervisors of an employee's medical condition is insufficient to establish that the employer regarded the employee as disabled." *See Phillips v. City of Dayton*, 2000 WL 224887, *3 (Minn. App. 2000); *see also Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (stating that the mere fact that employer had knowledge of employee's medical problems, did not show that employer regarded employee as having a disabling impairment).

⁷ Goodman claimed that he also told Tina Ahmed (his supervisor before Antonio) that he had high blood pressure. R. App., 49 (Goodman dep. p. 104). But, Goodman also admitted that Ahmed never discriminated against him. R. App., 8 (Goodman dep. p. 17).

“To survive summary judgment, an employee must provide evidence that supports a further inference that the employer regarded him as disabled.” *Johnson v. Loram Maintenance of Way, Inc.*, 83 F.Supp.2d at 1007, 1012-13 (D. Minn. 2000). That requires proof that the employer “perceived or treated” the employee as materially limited in a major life activity. *Webb v. Mercy Hosp.*, 102 F.3d 958, 959 (8th Cir. 1996) (“An employer ‘regards’ an employee as disabled only where the employer perceives or treats the employee as substantially impaired in a major life activity”). Goodman introduced no evidence that Antonio (or any other Best Buy employee) perceived or treated Goodman as materially limited in a major life activity. To the contrary, Goodman testified that Antonio never did or said anything that revealed a prejudice towards Goodman’s high blood pressure:

Q. Other than the discharge, Mr. Goodman, did Antonio ever say or do anything to you that leads you to believe that he was prejudiced against you because of any disabling condition?

A. No, not that I know of.

R. App., 10 (Goodman dep. p. 20). Goodman further testified that he did not have any evidence that Antonio’s decision to terminate him was based on his high blood pressure.

R. App., 9 (Goodman dep. p. 18). There is no evidence that Best Buy perceived or treated Goodman as disabled. Absent such evidence, Goodman cannot satisfy the third definition of a disabled person.

There is no evidence that Goodman was materially limited in a major life activity, that Goodman had a record of impairment that materially limited a major life activity, or that Goodman was regarded as disabled. Therefore, there is no evidence that Goodman

was disabled. Goodman's disability discrimination claim must be dismissed as a matter of law, because there is no evidence that Goodman had a disability.

3. Goodman Cannot Show that Best Buy's Reasons for Terminating His Employment Are a Pretext to Conceal Disability Discrimination.

Goodman's claims are also substantively infirm because even if he could establish a *prima facie* case (which he cannot), he cannot show that Best Buy's legitimate, non-discriminatory reason for terminating Goodman's employment – Goodman's excessive absenteeism – is a pretext to conceal disability discrimination. Goodman worked in Best Buy's Call Center taking customers' calls. Goodman's job required his regular and reliable attendance. Indeed, Call Center employees were expected to "work every day they are scheduled." R. App., 147-150 (Attendance Guidelines). And, the Call Center's policy was to terminate employees who were absent 9 times in a 12-month period. *Id.* Goodman admitted that he knew that policy. R. App., 11-12 (Goodman dep. pp. 21-22).

Despite that knowledge (and numerous warnings), Goodman missed work 9 times in a 12-month period. Goodman missed work on December 16, 2003, January 16, 2004, May 26, 2004, July 14, 2004, August 16, 2004, September 11, 2004, and October 16, 2004. Goodman received a written warning for his October 16 absence, i.e., his 7th absence. Still, Goodman continued to miss work. Goodman missed work on October 30, 2004, an absence for which he received a final written warning. Goodman missed a significant portion of his shift on December 17, 2004 and December 18, 2004, accruing half absences on both of those dates. And, Goodman missed work on February 11, 2005. Goodman's February 11 absence was his 8th absence in a 12-month period. Pursuant to

the attendance policy, if Goodman missed work again his employment would be terminated.

Significantly, Goodman missed work again, accruing his 9th absence on February 18, 2005. The only explanation Goodman offered for missing work on February 18 was that he was "sick." Absences for sickness were not excused and counted toward the attendance calculation. And, the Call Center's attendance policy clearly stated that an employee would be terminated if the employee was absent 9 times in a 12-month period. Goodman's February 18 absence was his 9th absence in a 12-month period. Pursuant to the Call Center's attendance policy, Goodman's employment was terminated on February 21, 2005 for his excessive absenteeism.

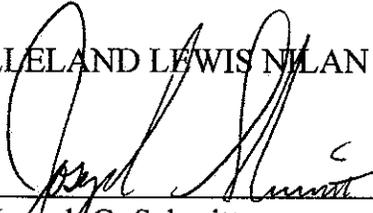
The law is well settled that excessive absenteeism is a legitimate and non-discriminatory reason for adverse employment action, even where the absences are health-related. *Schockency v. Jefferson Lines*, 439 N.W.2d 715, 719 (Minn. 1989) (stating that employee's poor attendance record was a legitimate, non-discriminatory reason for terminating employee's employment); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 808 (Minn. App. 1992) (stating that excessive absenteeism was a legitimate, non-discriminatory reason for discharging an employee from a secretarial position that required regular attendance, even though absences were caused by surgery for employee's disability). Goodman's disability discrimination claim fails as a matter of law, because Best Buy had a legitimate, non-discriminatory reason for terminating Goodman's employment, i.e., Goodman's excessive absenteeism.

CONCLUSION

The District Court properly held that Goodman's claims are untimely under Section 1367(d). This Court should affirm the District Court's grant of summary judgment.

Dated: November 26, 2007

HALLELAND LEWIS NILAN & JOHNSON P.A.

By: 

Joseph G. Schmitt Reg. No. 231447
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, Minnesota 55402
(612) 338-1838

ATTORNEYS FOR RESPONDENT