

**Case No. A08-1367**  
**State of Minnesota**  
**In Court of Appeals**

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**ELEN BAHR,**

*Appellant,*

**vs.**

**CAPELLA UNIVERSITY,**

*Respondent.*

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**APPELLANT'S BRIEF**

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## STATEMENT OF ISSUES

1. Whether the trial court erred in granting dismissal when it failed to consider only the facts alleged in the complaint, accepting those facts as true and to construe all reasonable inferences in favor of the nonmoving party.

2. Whether the trial court erred in granting dismissal when it held that Bahr was required to prove the discrimination claim underlying her claim for retaliation.

3. Whether the trial court erred when it determined that there was no adverse action in the alleged discrimination claim/refusal underlying Bahr's retaliation claim.

## STATEMENT OF CASE

This case arises out of the termination of Elen Bahr's employment with Capella University after she opposed Capella's discrimination. Elen Bahr challenges the trial court's grant of dismissal for failure to state a claim in favor of Capella University entered by the Hennepin County District Court, the Honorable Judge Denise D. Reilly presiding.

Appellant Elen Bahr brought this action for retaliatory discharge against Respondent Capella University pursuant to the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363A.15, which imposes civil liability on an employer for discharging an employee in retaliation for opposing a practice forbidden under the MHRA. The trial court granted dismissal in favor of Capella. *A. 3-13*.<sup>1</sup> Judgment was entered on July 7, 2008 and Bahr filed a timely appeal on August 8, 2008. *A. 1-3*; Minn.R.Civ.App. 103. Bahr now brings this case before the Court of Appeals and asks for a reversal of the trial court's order dismissing her case.

The trial court found that Bahr failed to state a claim of retaliation because she did not and could not plead that she engaged in statutorily protected conduct. Specifically, the court held that for purposes of a Rule 12 motion, a plaintiff must plead facts to show that the conduct she opposed

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<sup>1</sup> References to "A. \_\_\_" are to the Appellant's Appendix.

was an actual violation of the MHRA. *A. 9.* In this case, Bahr opposed race discrimination. Bahr opposed what she reasonably believed was discriminatory treatment of her subordinates. According to the trial court, however, Bahr failed to plead facts establishing that the practice she opposed was indeed discriminatory. *A. 9-12.* The court also determined, as a matter of law, Bahr could not have reasonably believed Capella's conduct was discriminatory. *A. 13 n. 2.* Therefore, Bahr's claim of engaging in statutorily protected conduct failed as a matter of law. *A. 13.*

## STATEMENT OF FACTS

Bahr began her employment with Capella in its communications department in February 2006. *A. 14, ¶ 3.* By August 2006, Bahr was promoted to a newly created position of Senior Communications manager. *Id.* In this position, Bahr managed a staff and was responsible for Capella's communications strategy and the management and execution of communications to its students. *Id.*

### **A. Bahr Begins Managing Ammons and Tries to Address Her Deficient Performance**

In June 2006, Bahr assumed management for Ms. Lila Ammons. *A. 15, ¶ 4.* Ammons is African American and was transferred from an executive assistant position into Bahr's department after her previous role within the company was eliminated. *Id.*

By September 2006, it was apparent to Bahr that Ammons was failing to meet expectations in her performance. *A. 15, ¶ 5.* As a result, Bahr provided informal coaching in project management skills in an attempt to boost Ammons' performance. *Id.* However, despite the coaching, Ammons demonstrated little to no improvement in the following months. *Id.*

In January 2007, Bahr contacted Capella's Human Resources department for guidance in how to work to improve Ammons' performance.

*A. 15, ¶ 6.* Specifically, Bahr reported her concerns to Ms. Nichole Scott, Senior HR Generalist for Capella. *Id.*

In February 2007, Bahr met formally with Ammons about her performance. *A. 15, ¶ 7.* Bahr documented several areas in which Ammons struggled. *Id.* Among the deficiencies were skills central to her job performance, including attention to detail, depth of knowledge and engagement with teammates. *Id.* Following this meeting, Bahr communicated her concerns about Ammons to HR and her fear that Ammons' poor performance was adversely affecting the entire team. *Id.*

On March 6, 2007, Bahr met with Ammons, again, to discuss performance concerns. *A. 15, ¶ 8.* Bahr, again, raised concerns of detail, knowledge and team involvement. *Id.* Ammons made excuses, including that she was overwhelmed and that her job was physically and emotionally taxing. *Id.* In response, Bahr took several steps to assist her. *Id.* Bahr set up specific processes to help Ammons better manage her time and workload. *Id.* She shifted some of Ammons' responsibility to another employee. *Id.* Both agreed they would meet for thirty minutes each week to monitor Ammons' performance. *Id.* Bahr was committed to helping Ammons succeed without detracting from the overall needs of the team. *Id.*

At the meeting, Bahr also discussed with Ammons her discontent with certain team members whom Ammons found competitive and negative. *A. 16, ¶ 9.*

Bahr encouraged Ammons to separate personality from work and try to address the situation on her own before Bahr would intervene. *Id.* Ammons told Bahr she did not want to confront co-workers or speak up within the team because she did not want to be perceived an “angry Black woman.” *Id.* Bahr offered to help take immediate action if Ammons believed the issue was based on race. *Id.*

**B. Capella Demands Bahr Treat Ammons and Her Performance Issues Differently From Her White Co-Workers**

On March 7, 2007, Bahr met with her supervisor, Brad Frank, Seth Lockner of HR, and Ms. Scott to discuss Ammons’ deficiencies. *A. 16, ¶ 10.* Bahr believed Ammons’ poor performance warranted a performance improvement plan (PIP). *Id.* Lockner demanded Bahr move slowly with Ammons and insisted that Bahr could not move forward with any formal PIP. *Id.*

This resistance to a PIP was highly unusual. *A. 16, ¶ 11.* Since joining Capella, Bahr had managed two employees through PIPs. *Id.* The first was a great success. *Id.* She was put on a PIP on April 6, 2006, made

improvements within thirty days, continued to excel in her job and has since been promoted. *Id.* The second was placed on an improvement plan on May 6, 2006, after Bahr had spent weeks trying to help her manage her issues. *Id.* She ultimately resigned. *Id.*

During March and April 2007, Bahr continued to work with Ammons on her deficiencies and tracked issues as they arose. *A. 16, ¶ 12.* Bahr continued to apprise Ms. Scott of Ammons' performance issues and Bahr's attempts to rehabilitate them. *Id.* Bahr reiterated the negative affect Ammons' poor performance was having on morale and behavior in her department. *Id.*

On March 27, 2007, Bahr met with Ammons, yet again, about the same deficiencies in performance. *A. 17, ¶ 13.* By now, other team members had expressed their frustrations to Bahr. *Id.* On several occasions employees had spent wasted time looking for documents that should have been easily accessible. *Id.* These documents contained legal and regulatory comments that were to be incorporated into communications. *Id.* The filing and tracking of these documents were part of Ammons' responsibilities. *Id.* Bahr had explained the importance of such details several times previously, but Ammons continually failed to grasp their significance. *Id.* Following

the meeting, Bahr summarized the conversation to Ms. Scott and reiterated her concerns. *Id.*

**C. Ammons' Performance Continues to Be Deficient - Capella Continues to Demand Bahr Treat Ammons Differently Than White Co-Workers**

Ms. Scott cautioned Bahr “to move more slowly on the matter [with Ammons] than she had ever moved on a performance issue.” *A. 17, ¶14.* She was told that Ammons “has a history” in the organization that were racially based and warned that any action could result in a discrimination lawsuit against Capella. *Id.* Ms. Scott added that Ammons’ situation was known and monitored by the highest levels in the organization, including Mr. Steve Shank, President and CEO of Capella. *Id.* Ms. Scott provided no guidance to Bahr but stated that she expected Bahr’s team to have enough confidence in Bahr’s ability to know that any performance issues would be resolved. *Id.* Bahr asked Ms. Scott how long she would be expected to rely on her good reputation with her team without having the ability to go forward as she deemed appropriate. *Id.* Ms. Scott could not answer that question. *Id.*

Around this same time, Bahr completed annual performance evaluations for her team members. *A.17, ¶ 15.* By the end of the week of March 26, Bahr had met with each person, except for Ammons. *Id.* Ms.

Scott insisted Bahr first send Ammons' review to her and to the legal department before she shared it with Ammons. *Id.* Bahr did as instructed. *Id.*

Capella's review process revealed that Ammons had received an overall performance rating of 2.5. *A. 18, ¶ 16.* According to Capella's policy, any rating below 3 must be addressed in the next year's performance goals. *Id.* Bahr drafted performance goals for Ammons in accordance with this policy and submitted them to HR as requested. *Id.* Bahr was told that no one in legal had time to review the performance evaluation. *Id.* This delayed Ammons' annual performance for several weeks. *Id.* Further, Bahr was instructed to not tell Ammons that her review was being put through this "special process." *Id.*

Following her review of the first draft of Ammons' review, Ms. Scott instructed Bahr to minimize the performance issues raised. *A. 18, ¶ 17.* Ms. Scott was again cryptic about "trying to do the right thing" and providing "balance" to Ammons' review. *Id.* Ms. Scott told Bahr to "take a fine tooth comb through it and get it back to me. Seth and I will look it over, vet it through legal and give you the go ahead to deliver." *Id.* No other employee in Bahr's department was subjected to such scrutiny. *Id.* In fact, no other evaluation was even reviewed by HR. *Id.*

**D. Bahr Opposes Capella's Differential and Discriminatory Treatment of Ammons and Her White Co-Workers**

On April 11, after HR had given their comments, Bahr formally reviewed Ammons' performance with her. *A. 18, ¶ 18.* Afterward, Bahr summarized the meeting to Ms. Scott and stated that she was committed to getting back to Ammons' with a specific plan for performance improvement. *Id.* Bahr suggested, again, that a formal plan be set in place. *Id.* Bahr felt frustrated with the restrictive process that HR and legal were putting on both her and Ammons. *Id.* She told Scott this treatment was unfair and discriminatory to Ammons and to other employees as no other employee was being treated this way. *Id.* Again, Bahr was told not to tell Ammons that HR and legal were so deeply involved in her review process. *Id.*

On April 16, Bahr met with Ms. Scott in person and put forward her plan of action for Ammons. *A. 18, ¶ 19.* Bahr told Scott it was time for Ammons to know her specific performance issues, the expectations for her job, and a reasonable plan for success. *Id.* Bahr also reviewed the plan with her supervisor, Brad Frank, and let him and Scott know that she would meet with Ammons on April 23<sup>rd</sup> to discuss the performance issues. *Id.* Bahr again told Scott and Frank that she believed that the treatment of Ammons was discriminatory and unfair to her and to other people in the department. *Id.*

The following day, April 17, Bahr was called to meet with Frank. *A. 19, ¶ 20.* Frank told Bahr that employees on her team had made complaints to HR about Bahr's performance. *Id.* Frank refused to be specific about the alleged complaints and he went on to compliment Bahr for her high performance. *Id.* In the same breath, he told her that there was a "general belief" that Bahr was "intimidating." *Id.* Bahr was surprised to hear any criticisms about her work performance and felt frustrated since she knew that such comments came from individuals who saw that Bahr seemed to be permitting Ammons to perform poorly without addressing the issues which reflected upon and affected the work performance level of the entire work team. *A. 19, ¶ 21.* Bahr also knew that Ammons was frustrated and had been sharing her frustrations with her colleagues. *Id.*

**E. After Bahr Complains of Discrimination She is Given Negative Performance Feedback and Put on a Performance Improvement Plan (PIP)**

In December 2006, Bahr had requested a 360-review of her department be conducted so that she could act proactively to address any issues or concerns of the newly-formed work team in her department that had only been in existence for a year. *A. 19, ¶ 22.* Frank denied Bahr's request, stating that it would not be equitable, since other managers had not been afforded the 360-review process opportunity. *Id.*

After Bahr made complaints about unfair discriminatory treatment of Ammons (in March and April) and other staff, Frank told her that a 360-review of Bahr would take place within the next thirty days. *A. 19-20, ¶ 23.* Once completed, they would discuss a development plan – *for Bahr. Id.*

Bahr asked that the review process include evaluations from people outside of her department as well as from within. *A. 20, ¶ 24.* Frank refused, saying that HR would not approve such an approach because it would not appear “equitable” with how HR worked with other managers in the company. *Id.* She again complained that the process she was made to implement for Ammons was not “equitable” and that HR ought to examine the issues with other employees it helped create when it failed to treat Ammons in the same manner as other employees. *Id.*

**F. Bahr Refuses to Discriminate and Treat Ammons Differently Than Her Co-Workers Because of Her Race**

On April 19, 2007, Bahr told Frank she could no longer actively participate in the discriminatory treatment of Ammons. *A. 20, ¶ 25.* She explained that the situation placed her in an ethically compromised situation *and she would no longer treat Ammons differently than other members of the team because of Ammons’ race. Id.* (emphasis added) She told him that when HR was ready to address the situation in a productive and fair manner,

she would actively participate in managing Ammons' performance issues.

*Id.*

On June 12, 2007, Frank asked Bahr how Ammons was performing. *A. 20, ¶ 26.* Bahr reiterated her frustration and discomfort with the situation and said, "She is still sitting in her chair collecting \$55K per year to not do her job." *Id.* He said that he would ask HR to consult with legal as to what should happen next. *Id.* Bahr reminded Frank that her hands were tied by the directives of HR and that she was unwilling to engage in discriminatory treatment. *Id.*

Also on June 12, 2007, Bahr met with Siobhan Cleary from Personnel Decision International (PDI) (an outside firm hired by Capella) to discuss the results of her 360-review. *A. 20-21, ¶ 27.* The results showed consistently high rankings of Bahr from her director and her peers. *Id.* The results from her staff revealed a two-point difference. *Id.* Bahr asked Cleary how she could address the disparity. *Id.* Cleary suggested Bahr meet with her team to discuss matters. *Id.*

On June 13, 2007, Bahr met with two of her team members to discuss some of the results. *A. 21, ¶ 28.* Later that day, Ms. Scott visited Bahr and told her that the employees notified HR of the conversations Bahr had with them. *Id.* Ms. Scott told Bahr she should not have met with her employees

and directed her to not talk with any of them further until a development plan was put in place. *Id.* Bahr complied. *Id.*

On June 14, 2007, Bahr provided Frank with a copy of her 360 review results so that he could be more prepared for a discussion they had scheduled for June 19, 2007. *A. 21, ¶ 29.*

Also on June 14, Bahr consulted with Linda Muehlbauer, Vice President of Learner Services, who suggested to Bahr that her situation sounded very similar to a situation that she was dealing with and managed with the assistance of Nicole Zuber, an organizational development consultant. *A. 21, ¶ 30.* Muehlbauer was supportive and confident that Bahr would be able to work through the situation, especially since so many resources were available and since there was so much precedent in dealing with what she thought to be similar issues. *Id.* She offered to assist and suggested Bahr seek out Zuber for assistance, as well. *Id.*

On June 18, 2007, Bahr met with Nicole Zuber to discuss ways in which she could work toward a more positive dynamic within her work team. *A. 21-22, ¶ 31.* Bahr knew that Zuber had consulted with other managers and assisted them in working through very serious, almost dire, circumstances with work groups in other departments including Advising, the Registrar's Office, Financial Aid and the Finance departments. *Id.* She

knew that other managers were also given opportunities to work on team dynamic issues. *Id.* The Events Manager, Tom Clemens, was afforded the benefit of working with an industrial organizational consulting firm. *Id.* Capella hired the firm to work with him for several months to change the dynamic of his work team. *Id.*

On June 19, 2007, Bahr told PDI, Nichole Scott, Brad Frank and Siobhan Cleary that she had taken steps to learn more about the resources available and how to improve the dynamics in her department. *A.22, ¶ 32.*

#### **G. Bahr is Terminated**

Frank told Bahr that he did not think she could turn the situation around to suit him and started to list various options for her termination. *A. 22, ¶ 33.* Bahr was stunned. *Id.* She had not been given any reason to believe that her employment was in jeopardy. *Id.*

The following day, on June 20, 2007, Bahr told Brad Frank that she would not resign, and Frank terminated her. *A. 22, ¶ 34.* He then told Bahr to go home. *Id.*

Bahr then commenced this action.

## SUMMARY OF ARGUMENT

Capella engaged in a pattern of retaliatory actions and finally terminated Bahr because she opposed and refused to engage in Capella's discriminatory acts in violation of the Minnesota Human Rights Act. In her Complaint, Bahr alleges that Capella repeatedly told her to treat her African-American subordinate differently from her white subordinates in the terms and conditions of employment. Bahr further alleges that Capella directed her to not criticize the performance of her African-American subordinate because she had a history of race "issues" and would sue Capella if she were the recipient of adverse action. Bahr told Capella that the actions it wanted her to take constituted discrimination on the basis of race against the employee *and* her non African-American co-workers. Bahr ultimately refused to participate in the discriminatory conduct. These facts, which state a claim for retaliation, should have been accepted as true and viewed in Bahr's favor.

But, the trial court found that Bahr failed to state a claim as a matter of law because she failed to sufficiently plead a claim of *discrimination*- the underlying conduct she opposed. In so holding, the Court required Bahr to plead facts sufficient to show not only the elements of her retaliation claim,

but also the elements of the underlying discrimination she opposed. This was error.

The Minnesota Human Rights Act was designed to put an end to discrimination in the workplace. Therefore, the MHRA contains an anti-retaliation provision which declares that it is an unfair discriminatory practice for an *employer* to “engage in any reprisal against any person because that person opposed a practice forbidden under this chapter or has filed a charge, assisted, or participated in any manner in an investigation...” Bahr complained of and refused to engage in conduct that is forbidden under the MHRA. Bahr complained and refused to engage in conduct that she reasonably believed to be discrimination based on race – conduct that is forbidden by the MHRA. Pursuant to the MHRA’s legislative intent, the Department of Human Rights and state and federal case law, Bahr’s complaint and refusal to perpetuate the alleged discrimination is *statutorily protected* conduct that was sufficiently pled.

The trial court erred further when it analyzed the conduct Bahr complained of and the adverse actions taken against Bahr’s subordinate. This case was before the court on a motion to dismiss for failure to state a claim. At this stage of the proceedings, the trial court’s function is simply to decide whether the Complaint sets forth a legally sufficient claim for relief.

The Court went far beyond its limited role and made determinations of fact and credibility. As such, the Court's order granting Capella's motion for dismissal must be reversed and remanded.

## **ARGUMENT**

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

Bahr's case was dismissed pursuant to Minn.R.Civ.P. 12.02(e) for failure to state a claim. The standard of review on a motion to dismiss is *de novo*. *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn.2008) (quoting *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn.2003). On a motion to dismiss, "[t]he only question before the court is whether the complaint sets forth a legally sufficient claim for relief. It is immaterial to [the court's] consideration here whether or not the plaintiff can prove the facts alleged." *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn.1980)(citations omitted). "The Court is to consider only the facts as alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party," the Appellant in this case. *Herbert*, 744 N.W.2d at 229. Therefore, a Rule 12.02 (e) motion will be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Northern States Power Co. v. Minnesota Metropolitan Council*,

684 N.W.2d 485, 490 (Minn. 2004) (quoting *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)). And, on the other hand, such a motion should be granted ". . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir.1993) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir.1974)). Since a Rule 12 motion is focused on the pleadings, consideration of the general rules of pleading must also be considered.

As a general principle, courts prefer to dispose of matters on the merits rather than on technical procedural grounds. See *Rees v. Storms*, 101 Minn. 381, 384, 112 N.W. 419, 420 (1907); Minn.R.Civ.P. 61. According to Minnesota Rule of Civil Procedure 8.01 "A pleading which sets forth a claim for relief \* \* \* shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." The Supreme Court has interpreted this to only require a "broad general statement which may express conclusions". *Northern States Power Co., v. Franklin*, 122 N.W.2d at 29. And, according to Minn.R.Civ.P. 8.06, "All pleadings shall be so construed as to do substantial justice." In furtherance of justice, on a motion to dismiss, the complaint must be liberally construed. *Royal Reality Co. v. Lavin*, 244 Minn.288, 69

N.W.2d 667 (1955). And, the complaint should be read as a whole.

*Consumer Grain Co. v. Wm. Lindeke Roller Mills*, 153 Minn. 231, 190

N.W.65 (1922). Finally, a complaint by its allegations may assert two

theories and this will not render the entire complaint void. *Casey v.*

*American Bridge Co. of New Jersey*, 95 Minn.11, 103 N.W. 623 (1905).

## **II. BAHR SUFFICIENTLY PLED A CLAIM OF RETALIATION**

To plead a prima facie case of retaliation, a plaintiff must allege facts of 1) statutorily protected conduct; 2) adverse action; and 3) causal connection between the two. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 548 (Minn. 2001) (quoting *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983)). There is no dispute that Bahr pled the second and third elements. The only element at issue is whether Bahr engaged in statutorily protected conduct.

In this case, Bahr alleged she was repeatedly told by Capella to treat her African-American subordinate (Ammons) differently from her white subordinates in the terms and conditions of employment. Specifically, Capella directed Bahr to not engage in performance criticism or place Ammons on a performance improvement plan because she had a history of race “issues” and would sue Capella if she were the recipient of adverse action. Bahr specifically told her employer that the actions it wanted her to

take constituted discrimination on the basis of race against Ammons *and* her non-African American co-workers. Bahr refused to participate in the discriminatory conduct. And, just weeks later, she was fired. These sufficiently pled facts establishing statutorily protected conduct for a claim of retaliation under the MHRA - according to the plain language of the Act, legislative intent, agency interpretations and case law.

**A. The Plain Language of the MHRA is Clear: A Plaintiff Sufficiently Pleads Statutorily Protected Conduct Where the Facts Show Plaintiff Opposed a Practice Forbidden Under the Act**

The central question in this case is what facts a plaintiff must allege to sufficiently plead statutorily protected conduct. According to the MHRA, it is an unfair discriminatory practice for an employer to “engage in any reprisal against any person because that person *opposed* a practice forbidden under this chapter or has filed a charge, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this chapter.” Minn.Stat. § 363A.15 (emphasis added). Statutorily protected conduct, therefore, may take several forms, including opposing a practice, filing a charge, assisting or participating in an investigation. “Reprisal” is defined under the MHRA as including “any form of intimidation, retaliation or harassment,” including “depart[ure] from any customary employment practice” or assignment to a “lesser position in terms of wages, hours, job

classification, job security, or other employment status.” Minn. Stat. § 363A.15.

According to canons of statutory construction, “when the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded...” Minn.Stat. § 645.16. Bahr argues the words of the MHRA – “opposing a practice forbidden under” the Act- are free from ambiguity. Just as the MHRA states, a plaintiff must oppose a practice it forbids. In this case, Bahr opposed discrimination based on race. This is a forbidden practice under the MHRA. Minn.Stat. § 363A.08, Subd. 2. There can be no dispute that Bahr’s Complaint sufficiently alleges she opposed a practice forbidden under the MHRA. The words of the MHRA have also been read to protect an employee who has a reasonable good faith belief that the conduct she opposed is a forbidden practice. This is consistent with the Act’s language, because a plaintiff who has a reasonable, good faith belief that conduct forbidden under the Act has occurred and opposes it, has “oppos[ed] a practice forbidden under the Act.” See *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 689 (D.Minn. 1977) (“when an employee reasonably believes that discrimination exists, opposition thereto is

opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.”)

The trial court, like *Capella*, however, rejected this interpretation and read the language of the MHRA more strictly. According to the trial court, to state a claim of retaliation an employee must go a step further and actually prove the merits of the underlying claim. This essentially requires a plaintiff to establish a case within a case- establish both the prima facie elements of retaliation and the underlying complaint of discrimination. There is no language in the MHRA, however, supporting this requirement and burden. And to hold that such a requirement does exist is to read a requirement into the MHRA that simply is not there. As the Minnesota Supreme Court has made clear, it will not look beyond the plain language of the statute to create another requirement: “we will not look beyond [the Act’s] text to search for an unexpressed \* \* \* requirement.” *Anderson-Johannigmeier v. Mid-Minnesota Women’s Center Inc.*, 637 N.W.2d 270 (Minn.2002).

Although Bahr argues the language of the MHRA is clear and free from ambiguity, requiring the employee to simply allege a practice forbidden under the MHRA or allege a reasonable good faith belief as described above, this Court may determine that the plain language of the Act is ambiguous. *See* Minn.Stat. § 645.17 (1). If the Court does so, the

legislative intent behind the MHRA should be examined. Minn.Stat. § 645.16. Examining the intent behind the MHRA indicates that the reasonable belief standard, not the actual violation standard adopted by the trial court, is consistent with the legislature's intent.

**B. The Reasonable Belief Standard is Consistent with the Legislative Intent of the MHRA to Rid the Workplace of Discrimination**

To ascertain the legislature's intent, the Court must consider, among other things, the occasion and necessity for the law; the mischief to be remedied; the object to be obtained; and the consequences of a particular interpretation. Minn. Stat. §§ 645.16 (1), (3), (4), (6). The Minnesota Legislature has made clear that the overall necessity for and objective to be obtained by the MHRA is to rid the workplace of discrimination. Minn.Stat. § 363A.02, Subd. 1, (a)(1). This is *the* mischief to be remedied by the Act: “[D]iscrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn.Stat. § 363A.02, Subd. 1 (b). As a final punctuation to its message of eliminating discrimination, the legislature mandates a broad and liberal interpretation of the MHRA. Minn.Stat. § 363A.04. All these factors make clear that the legislature intended the MHRA to be interpreted in order to provide the broadest protections possible as long as that interpretation ends

with a reasonable result. This intent can be accomplished through the reasonable belief standard.<sup>2</sup>

Legislative intent leaves no doubt that the MHRA, inclusive of the retaliation provisions, was designed to rid the workplace of discrimination. To that end, based on what it does and does not say, the retaliation provision is clearly focused not upon whether or not the underlying conduct alleged is “[prohibited] discrimination, but instead upon an *employer’s actions taken to punish an employee who makes a claim of discrimination.*” *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8<sup>th</sup> Cir. 2005)(emphasis added). This focus on the employer’s conduct, rather than on the legal merits of the employee’s complaint, makes sense. The best way to effect the legislature’s intent to rid the workplace of discrimination is to focus on the employer since it is responsible for and controls the environment and conduct in the workplace. The focus should be placed on ways the employer can be encouraged to operate its workplace consistent with, or discouraged to operate inconsistent with, the MHRA. To focus on the employee and the legal merits of the conduct they opposed, however, is inconsistent with the plain meaning and purpose of the MHRA and does not work to eliminate

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<sup>2</sup> The alternative interpretation offered by Bahr (that simply alleging a practice forbidden under the Act that does not examine the employee’s complaint) would also accomplish the Act’s intent.

discrimination. Instead, it leads to the absurd result of actually working against its purpose by discouraging employees from opposing perceived discrimination out of the fear that the employer will be even more inclined to exact retaliation when the complained-of conduct does not actually violate the Act. *Hearth*, 436 F.Supp. 688. (“[I]nformal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist.”) But, this is precisely what the retaliation provision was designed to prevent.

Furthermore, providing protection to only those employees who complain of conduct that is an actual violation of the MHRA leads to the unreasonable result of requiring employees to make snap judgments about the legal merit of conduct that sometimes takes judges and lawyers years to unravel. The reasonable belief standard, on the other hand, strikes an appropriate balance between ensuring protections are provided to the broadest number of employees opposing discrimination, thereby encouraging its elimination from the workplace and at the same time, shielding employers from claims of discrimination and retaliation that are made in bad faith.

The reasonable belief standard is further supported by the rules and presumptions applied to statutory interpretation. For example, the

reasonable belief standard is consistent with the presumption that the legislature intends to favor the public interest rather than any private interests. Minn.Stat. § 645.17 (5). It also leads to a reasonable interpretation of the MHRA. Minn.Stat. § 645.17 (1) (stating presumption that legislature intends a reasonable result from the interpretation of a law.) That is, in addition to the reason already detailed, there is no dispute that when an employee files a charge of discrimination with the MDHR, she has engaged in protected conduct. And, there can be no dispute that conduct is protected whether or not the charge ultimately is found to have merit either through the agency or through district court. As set forth in the MHRA, an employee who assists or participates in an investigation either internally or in litigation is protected - whether or not the facts that instigated the investigation rise to the level of an actual violation of law.

It is reasonable, therefore, to provide the same protections afforded employees who file charges, assist or participate in investigations of discrimination to employees who, like Bahr, do essentially the same thing, but make their reports directly to the employer. Whether filing a charge, participating in an investigation or reporting to their employer, each employee is acting in a manner contemplated and encouraged by the plain language and purpose of MHRA. Nothing in the Act makes it necessary and

“[i]t should not be necessary for an employee to resort immediately to the [MDHR]...in order to bring complaints of discrimination to the attention of the employer with some measure of protection.” *Hearth*, 436 F.Supp. at 688-89. Again, to require the employee to prove an actual violation or to only provide protections for those who file a charge is entirely contrary to the language of the MHRA and its intent. It also leaves employees who arguably are in the most need of protection from reprisal, because they reported directly and privately to their employer, with no protection. Furthermore, the MHRA expresses no preferences regarding with whom or where the employee’s opposition to what she believes to be unfair practices is placed. It simply encourages opposition to discrimination and protects those who do so. *See Id.* (“The resolution of such charges without governmental prodding should be encouraged.”) In this case, Bahr reported what she reasonably believed to be discriminatory acts and refused to participate in the same. Bahr is, therefore, deserving of protection under the Act.

Finally, when ascertaining the legislature’s intent, the Court may also consider administrative interpretations of the law. Minn. Stat. 645.16 (8). The Department of Human Rights, the agency responsible for enforcing the MHRA, applies the reasonable belief standard to claims of retaliation.

**C. The Department of Human Rights Applies the Reasonable Belief Standard**

The Commissioner of the Department of Human Rights, whose job it is to enforce the Minnesota Human Rights Act, has represented that it interprets and enforces claims of retaliation as requiring a good faith reasonable belief of discrimination. *Request of State of Minnesota By Its Commissioner of Human Rights For Leave to File as an Amicus Curiae*, pg. 3. Indeed, the Commissioner has issued probable cause determinations of retaliation where there is no probable cause for the underlying allegations of discrimination. *Id.* Not only is the Department's position further proof that the reasonable belief standard is the appropriate standard, it further emphasizes the fact that the reasonable belief standard is consistent with the plain words of the MHRA and its intent. Finally, the Department's position also provides further support that state and federal case law which apply the reasonable belief standard, is correct.

**D. The Reasonable Belief Standard is Consistent with Minnesota State and Federal Case Law**

Both the Minnesota Court of Appeals and federal courts apply the reasonable belief standard.

**1. Minnesota State Courts Have Applied the Reasonable Belief Standard**

Consistent with the principles set forth above, the Minnesota Court of Appeals has applied the reasonable belief standard to reverse lower courts that failed to apply it. For example, in *Jones v. Minneapolis Public Schools*, No. C1-02-1523, 2003 WL 1962062 (Minn.App. April 29, 2003), the lower court granted summary judgment in favor of the defendant because plaintiff failed to raise an issue of fact as to whether or not he engaged in protected conduct. Reversing the lower court, the Court of Appeals found that to raise a question of fact, plaintiff need only establish a good faith, reasonable belief that defendant was engaging in illegal discrimination. *Id.* \*3. The Court of Appeals further noted that determining whether good faith exists is typically a question of fact for the jury. *Id.*

More recently, in *Loew v. Dodge County Soil and Water Conserv. Dist.*, No. A05-1574, 2006 WL 1229641 (Minn.App. May 9, 2006), the Court of Appeals reversed the lower court decision that plaintiff failed to establish a question of fact regarding whether she engaged in protected activity. The Court of Appeals analyzed plaintiff's protected activity under the good faith reasonable belief standard. *Loew*, at \*8-9. The Court noted that while simply "claiming" a belief is not sufficient, it is error for the district court to not consider whether the plaintiff had a good faith

reasonable belief that she was opposing an illegal practice. *Loew*, at \* 8. Under this standard, the Court of Appeals found the lower court erred in granting summary judgment because facts supported or established a question of fact as to the protected activity element. *Id.* at \*8-9. See also *State v. Wallin D.D.S.*, No. C8-96-1542, 1997 WL 53016 (Minn.App. Feb. 11, 1997); *Olchefski v. Star Tribune*, CX-94-1988, 1995 WL 70190 \*3 (Minn.App. Feb. 21, 1995) (retaliation “claims survive even if the underlying conduct...not illegal.”) Federal courts have long applied the reasonable belief standard as well.

## **2. Federal Courts Have Long Applied the Reasonable Belief Standard**

Federal case law analyzing Title VII<sup>3</sup> retaliation claims is clear: the complained of conduct need not be an actual violation to be statutorily protected conduct. In one of Minnesota’s earliest decisions on the issue, if not the earliest decision, the district court denied defendant’s motion for summary judgment on plaintiff’s retaliation claim-even though the underlying discrimination claim failed. The Court’s decision was based, in

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<sup>3</sup> “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. 2000e-3(a).

part, on the fact that to hold otherwise would leave employees unable to complain of discrimination without fear of reprisal if the conduct was not a violation and because the language of the Act did not make such a requirement:

The statutory language does not compel a contrary result. The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation. When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.

*Hearth v. Metropolitan Transit*, 436 F.Supp. 685, 689 (D.Minn. 1977).

The Eighth Circuit has continued with and built upon this reasoning in reversing several decisions where lower courts required more. For example, in *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1155 (8<sup>th</sup> Cir. 1989), the Eighth Circuit reversed the district court's dismissal of the plaintiff's retaliation case because he did not establish that the underlying conduct constituted discrimination. In so doing, the court made clear that a plaintiff need only show that he had a good faith reasonable belief the conduct was a violation. *Wentz*, 869 F.2d at 1155 (citing *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir.1988); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8<sup>th</sup> Cir.1981)(collecting cases)). Therefore, the Court held that even though the plaintiff's discrimination

claim was unsuccessful, it did not preclude him from pursuing his retaliation claim. *Wentz* at 1155.

More recently, in *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 714 (8<sup>th</sup> Cir. 2000), the Court held that plaintiff need only show he had a good faith belief the underlying conduct was a violation: “[w]ithout determining whether [the employee’s] comment would be sufficient to prove discrimination, we believe [plaintiff] could demonstrate a good faith reasonable belief that the challenged conduct violated the law.” *Buettner*, 216 F.3d at 714-715.

Importantly, the Eighth Circuit has pointed out that requiring the employee to oppose a practice forbidden by law unfairly burdens the employee with the ever changing standards of what constitutes discrimination:

The court’s understanding of what constitutes sexual harassment under Title VII is evolving; plaintiffs who reasonably believe that conduct violates Title VII should be protected from retaliation, *even if a court ultimately concludes that plaintiff was mistaken in her belief.*

*Peterson v. Scott County*, 406 F.3d 515, 525 at n.3 (8<sup>th</sup> Cir. 2005) (emphasis added) (citations omitted).

Therefore, in *Peterson*, although the court found the conduct complained of was not actionable harassment, it was not convinced that Peterson's belief that the conduct was a violation was unreasonable.

*Peterson*, 406 F.3d at 525 at n.3.

Finally, and most recently, in *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112 (8th Cir. 2006), the Eighth Circuit announced, "in general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, *the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.*" *Wallace*, 442 F.3d at 1118 (8th Cir. 2006) (emphasis added).

In sum, state and federal courts agree, "a retaliation claim is not based upon [prohibited] discrimination, but instead upon an *employer's actions taken to punish an employee who makes a claim of discrimination.*" *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8<sup>th</sup> Cir. 2005)(emphasis added); *Van Orden v. Wells Fargo Home Mortg., Inc.* 443 F.Supp.2d 1051 (S.D. Iowa 2006).

### **III. THE TRIAL COURT MADE SEVERAL ERRORS OF LAW AND IN SO DOING APPLIED A LEGALLY INCORRECT STANDARD FOR ESTABLISHING RETALIATION**

The trial court held Bahr failed to plead a claim of retaliation.

Specifically, the court held that to avoid a Rule 12 motion on her retaliation claim, Bahr had to sufficiently plead that Bahr's refusal to or opposition to engage in what she described as discriminatory treatment of Ammons was in fact discriminatory conduct under the MHRA. Put another way, the trial court found that Bahr had to prove the prima facie elements to her retaliation claim in addition to the prima facie elements of a claim of discrimination for Ammons. The trial court found Bahr could not establish that the underlying discrimination against Ammons was actually a violation of the Act because failing to place an employee on a PIP is not adverse action. Opposition to that allegedly discriminatory conduct against Ammons, therefore, was not statutorily protected conduct. In turn, Bahr's allegation that she was terminated for refusing to engage in that allegedly discriminatory conduct could not be retaliatory. Finally, in a footnote, the court stated that even if the good faith reasonable belief standard did apply it would not change the outcome of the court's decision. The court held that Bahr's claimed belief that failing to place Ammons on a PIP to be discriminatory is unreasonable as a matter of law and cannot survive a motion to dismiss.

The trial court made at least three errors of law, including but not limited to: misapplying the standard of review; misapplying and misinterpreting the MHRA; and misapplying and misinterpreting case law.

**A. The Trial Court Misapplied the Standard of Review by Deciding Issues of Fact**

The trial court held that Bahr's belief that failing to place Ammons on a PIP to be discriminatory was unreasonable as a matter of law and cannot survive a motion to dismiss. *A. 9-12.*<sup>4</sup> First, the Court's determination of Bahr's good faith was an error of law. Determining whether good faith or a reasonable belief exists is typically a question of fact for the jury. *Jones*, 2003 WL 1962062 \*3.

Second, the court's decision was erroneous as a simple matter of pleading. The court failed to take the facts as alleged in the complaint and accept them as true and failed to read the facts and inferences in Bahr's favor. When proper review of the pleading is applied it is clear that Bahr did indeed plead, and in fact had, a good faith reasonable belief that Capella's was discriminatory.

As set forth in her Complaint, Plaintiff alleged that she engaged in the protected activity of reporting racially discriminatory conduct on several

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<sup>4</sup> The trial court's decision that the failure to place an employee on a PIP is not discriminatory as a matter of law is discussed *Infra* Section III (C).

occasions, including April 11, April 19, April 23 and June 12, 2007, and that she ultimately refused to continue to perpetuate that discriminatory treatment. Plaintiff specifically told her employer that the actions it wanted her to take constituted discrimination on the basis of race against Ammons and her non-African American co-workers. Plaintiff was terminated on June 20, 2007 when she was told by her manager that he didn't believe she could "turn the situation around to suit him." In the weeks between the April reports and refusals and the final report and refusal in June, Plaintiff was subjected to the adverse actions of a 360 evaluation, verbal warnings, a PIP and differential treatment when she was not provided the same support and resources available to other "non-reporter" managers. As discussed in more detail below, these acts sufficiently plead a case of retaliation. See *Infra* Section III (B) and (C).

Based on the rules of procedure and pleading, Bahr's claim was properly pled and should not be dismissed. This is not the *unusual* case where, beyond a doubt, Plaintiff would be unable to prove any set of facts in support of her claim.

**B. The Trial Court Misapplied, Misinterpreted and Ignored the Plain Language and Intent of the MHRA**

In this case, the Trial Court failed to consider the language and intent of the MHRA. Not only is the court's decision void of any actual analysis of

the language of the Act, there is not a hint of consideration of the Act's intent. Instead, the Court read a phantom requirement into the Act that a plaintiff must essentially prove a case of discrimination within a case of retaliation. Not only does this impermissibly read a requirement into the MHRA, it violates the intent and policy behind the MHRA to rid the workplace of discrimination. It leads to the absurd result of leaving employees susceptible to and fearful of retaliation, thereby discouraging reports of discrimination. And the trial court's interpretation results in the MHRA imposing a more onerous standard than Title VII. Such a holding violates the MHRA's long history of providing broader protections than federal law. *Carlson v. Ind. Sch. Dist. No.*, 623, 392 N.W.2d 216, 221 (Minn. 1986).

### **C. The Trial Court Misapplied, Misinterpreted and Ignored State and Federal Case Law**

The trial court made two essential errors with regard to the case law upon which it relied. First, it relied on inapplicable and unpersuasive case law to support its contention that Bahr had to show that the discrimination that she complained about actually was a violation of the Act. Second, the court relied on unpersuasive case law and misapplied it with regard to the issue of whether or not failing to place Ammons on a PIP constituted adverse action.

## 1. The Court Relied on Inapplicable and Unpersuasive Case Law

The trial court's main premise - that a plaintiff must prove the merits of the underlying conduct and that it is a violation of the MHRA - is based on irrelevant and inapplicable case law. In support of this contention the Court relied on *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452 (Minn. 2006). *Nelson* is a Minnesota Whistleblower Act case and is not instructive on the standard for a claim of retaliation under the MHRA.

The Court went on further to argue that simply alleging discrimination where there is none does not constitute protected activity. The court relied on *Womack v. City of Minneapolis*, A06-11, 2006 WL 2530401 (Minn.Ct.App.2006) for this proposition. *Womack* is procedurally and factually distinct from this case. *Womack*'s retaliation claim was decided on a motion for summary judgment. In *Womack*, there was no evidence to support Plaintiff's claim that he ever made any allegation or complaint of discrimination. *Womack*, at \*5. In this case, however, as the trial court recognized, Bahr's Complaint makes clear that she complained of discrimination numerous times.

Finally, the legal principle cited by *Womack* - alleging discrimination where there is none is not sufficient - is not accurate and is taken out of context. That is, *Womack* cites *Dietrich v. Canadian Specific Ltd.*, 536

*N.W.2d 319, 327 (Minn.2005)*, in support of the statement. In *Dietrich*, the Plaintiff complained of “discrimination” and “unfair” treatment to her employer; when that got her nowhere she filed a charge with the MDHR. The alleged discriminatory conduct made prior to the plaintiff’s MDHR charge and the alleged discriminatory conduct in the charge was the same. Significantly, while the Court did not consider the conduct alleged before or in her MDHR charge to actually be discriminatory, the fact of her MDHR charge was considered protected conduct. *Dietrich*, 536 N.W.2d at 327. The Court’s reasoning for only finding the allegations in the charge as statutorily protected conduct was based on the fact that the plaintiff’s complaints of discrimination prior to her MDHR charge were not sufficient to put the employer on alert that she was complaining about discrimination considered unlawful under the MHRA.

The cases relied on by the trial court simply do not support its holding and do not outweigh the plain language of the MHRA, its intent, the Department of Human Rights interpretation and the overwhelming legal authority contradicting it.

## **2. Failing to Place an Employee on an Improvement Plan May Be Adverse Action**

The trial court also erred holding that Bahr was unreasonable as a matter of law in her belief that the conduct she opposed or refused to engage

in with regard to Ammons was discriminatory. First, Bahr complained that the conduct taken was discriminatory toward Ammons *and* the other non-African-American employees. Second, Bahr opposed discrimination. The MHRA defines “discrimination” as conduct that includes segregation or separation. Minn.Stat. § 363A.03, Subd. 13. The Minnesota Supreme Court has further explained that “discrimination” includes “distinction in treatment of an individual based upon impermissible or irrelevant factors such as race, color, creed, sex.” *City of Minneapolis v. Richardson*, 307 Minn. 80, 239 N.W.2d 197, 201-02 (1976). Moreover, when determining what constitutes discrimination, the court must consider all facts and circumstances in their totality. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 572 (Minn.1994). With these standards in mind, and based on the facts as alleged, telling Bahr to “move slowly” in performance and disciplinary matters was a distinction in treatment of an individual based on an impermissible factor. It was not the usual and customary practice of Capella. Indeed, unlike its treatment of Ammons, it moved quickly to discipline Bahr when it wanted her out. Despite Bahr’s complaints, the HR manager and Bahr’s manager continued to direct Bahr to discriminate against Ammons.<sup>5</sup> Bahr stuck to her position on the law and policy

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<sup>5</sup>As previously argued, the adverse action Ammons was subjected to

appropriately and her manager and HR terminated her because of it. Bahr became an obstacle to management and to the company's desire to avoid a race-based discrimination lawsuit by her refusal to cooperate in differential treatment based on race.

Third, the Court relied heavily on *Cullom v. Brown*, 209 F.3d 1035 (7<sup>th</sup> Cir.2000) to support its contention that failing to place Ammons on a PIP is not adverse action. *Cullom*, however, is procedurally distinct as it was decided on motion for summary judgment. *Cullom* is also factually distinct. But to understand those distinctions, a review of a case the Court attempts to distinguish itself from- *Vaughn v. Edel*, 918 F.2d 517 (5<sup>th</sup> Cir.1990)- must be considered.

In *Vaughn*, the Fifth Circuit held that an African-American employee had a claim of discrimination where defendant initiated a “non-confrontation” policy regarding a plaintiff to avoid a race discrimination suit. *Id.* at 522. By failing to criticize or counsel her on how to improve her

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included not being placed on an improvement plan which “short changed” her on her feedback and ability to improve. As Bahr alleged, however, Ammons was not the only one suffering from discrimination and its effects. Her other non African-American employees, including Bahr, were receiving PIPs and negative feedback based on a far different standard. And, Ammons co-workers, who were subjected to Ammons’ poor performance, had their work environments affected by the discriminatory (favorable treatment) of Ammons as well. To be clear, however, Bahr does not agree or concede she is required to plead these facts.

work the court found the plaintiff was treated differently than other employees because she was black. *Id.* at 522. This was discriminatory:

As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees... We have no doubt that, in not criticizing or counselling Vaughn, self-interest rather than racial hostility motivated Texaco. Nevertheless, we agree with the magistrate that Texaco ignored its own procedures for a racial reason, however benign that reason may initially appear to be.

*Id.* at 522-23.

While the plaintiff in *Vaughn* was fired the Court held it was error to only focus on the final act of firing and explained that whether Texaco decisions ultimately benefitted or harmed Vaughn was irrelevant because the decisions to not apply the usual procedures were racial decisions. *Id.* at 523. “*When an employer excludes black employees from its efforts to improve efficiency, it subverts the ‘broad overriding interest’ of Title VII- efficient and trusty workmanship assured through fair and racially neutral employment and personnel decisions.*” *Id.* (emphasis added) (citations omitted). Like the Court in *Vaughn* found the hands off approach taken by the defendant to be discriminatory, so too could the fact-finder find Capella’s direction to “move slow” to be discriminatory. At a minimum, it was an error of law for the trial court to hold that Bahr failed, as a matter of

law, to show she had a reasonable good faith belief Capella's conduct was discriminatory.

The *Cullom* court did attempt to distinguish *Vaughn* – on the basis that the plaintiff in *Vaughn* didn't know she was performing unsatisfactorily and was not provided the opportunity to improve. *Cullom*, at 1042. As the facts in this case are pled, it is most akin to *Vaughn*. Ammons was not really informed of her performance and while she continued to be employed she was not provided the same tools others were provided to really improve.

In sum, the facts and case law indicate that Bahr's belief that Capella's actions were discriminatory was not unreasonable as a matter of law. Again, the critical inquiry is not directed at the employee but at the employer's actions taken to punish an employee who makes a claim of discrimination. Based on the allegations of her Complaint, that the Court must accept as true, Bahr presented evidence that her belief that discrimination was occurring was reasonable. There is no evidence or facts to the contrary.

### **CONCLUSION**

The dismissal of Bahr's Complaint was based on a fundamentally flawed legal analysis and flawed interpretation of the MHRA, its anti-retaliation provision and case law. According to the MHRA, it is an unfair

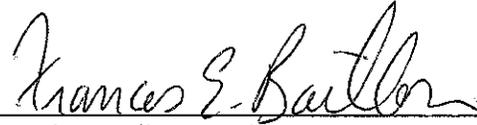
practice for an employer to engage in retaliation against an employee who “opposes a practice forbidden under” the Act. In her Complaint, Bahr alleged she opposed the discriminatory treatment of Ammons and her non African-American co-workers. She opposed Capella’s discriminatory treatment based on race. The facts alleged also show she had a good faith reasonable belief that the conduct she opposed was forbidden.

Viewing these and the other facts alleged in Bahr’s Complaint in a light most favorable to her, and considering only whether those facts set forth a legally sufficient claim, Bahr “opposed a practice forbidden” under the Act. Based on the plain language of the Act, Bahr’s Complaint is sufficient and dismissal was not appropriate. The judgment must therefore be reversed and the case remanded.

Respectfully submitted,

Dated this 10<sup>th</sup> day of September, 2008

HALUNEN & ASSOCIATES

A handwritten signature in cursive script that reads "Frances E. Baillon". The signature is written in black ink and is positioned above a horizontal line.

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*Attorneys for Appellant*

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

**Case No. A08-1367**

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Elen Bahr,

Appellant,

v.

**CERTIFICATE OF WORD COUNT  
COMPLIANCE**

Capella University.,

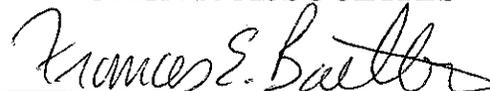
Respondent.

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I, Frances E. Baillon, one of the counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's Brief complies with the Minnesota Rules of Appellate Procedure. I certify that Microsoft Word 2003 word count function was applied and that the Memorandum contains 9,575 words.

Dated this 10<sup>th</sup> day of September 2008.

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