MINNESOTA STATE LAW LIBRARY

Case No. A08-1367

State of Minnesota

In Court of Appeals

ELEN BAHR,

Appellant,

vs.

CAPELLA UNIVERSITY,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

At its core, Capella's brief relies on two arguments, both contradicted by the facts and law. First, Capella casts Bahr's Complaint as insufficiently pled and speculative. Bahr's Complaint is properly pled and definite.

Second, in a tactic often used to avoid liability in almost any context, Capella tries to make this case about something else. Capella attempts to reframe Bahr's claim of retaliation into one of discrimination. But, Bahr's retaliation claim does not require she prove a claim of discrimination. The language of the MHRA, public policy, case law and the Commissioner of the Department of Human Rights all make clear Bahr need only allege she had a good faith reasonable belief the conduct she opposed was a forbidden practice under the MHRA.

I. STANDARD OF REVIEW

A. Bahr's Complaint is Definite

In her Complaint, Bahr alleged that she was instructed by Capella on numerous occasions to treat her African-American subordinate (Ammons) differently from her other subordinates in the terms and conditions of employment. Bahr was instructed to treat Ammons differently because of her race. When Ammons had performance issues, Bahr was told to "move slow' with her (because Ammons had "a history" in the organization that was racially based) to minimize her performance issues, and take a fine tooth comb through her performance review. *A. 17-18.* Bahr simply wanted to deal with and address Ammons'

performance issues as she did with others. She wanted to bring specific performance issues to Ammons attention and give her a reasonable plan for success. *A. 18, ¶ 19.* But Capella repeatedly told her not to do so. Finally, Bahr began telling her managers that she believed that its treatment of Ammons was *discriminatory and unfair to her and to other people in the department. A. 18, ¶ 19.* Bahr told her manager that Capella's treatment of Ammons 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. *A. 20, ¶ 25.* She made a similar objection and refusal on June 12, 2007 and was then terminated on June 20, 2007. *A.22, ¶ 34.*

Bahr's retaliation claim is clear and definite. She complained of and refused to engage in discriminatory treatment based on race and was terminated just eight days after her last complaint. Bahr's Complaint sets forth "enough facts to state a claim to relief that is plausible on its face" *Bell Atlantic v. Twombly*, --- U.S. ---, 127. S.Ct. 1955, 64-65; 1974 (2007).[1] . And, it provides the "grounds" of "entitlement' to relief well beyond the speculative level. *Twombly*, 127 S.Ct. at 1964-65.[2]

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[1] It is not clear to what extent *Twombly* will impact state pleading standards. The Minnesota Supreme Court has cited *Twombly* but it has not addressed the extent of its applicability. The court has a history of not always following the United States Supreme Court precedent regarding procedural rules. Compare *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn.2000).

[2] *Twombly* is also distinct from this case. In *Twombly*, the Court alleged it would have to speculate about certain facts to bridge the gap between plaintiff's

Nevertheless, Capella takes considerable effort to create speculation regarding the underlying discrimination claim to avoid addressing liability on the real claim at issue- retaliation. Capella also uses this tactic to prematurely argue the merits of the claim. For example, Capella argues it can not tell whether Bahr is claiming Capella discriminated for or against Ammons or for or against Ammons' co-workers.[3] Capella's confusion is feigned. Bahr specifically alleges in her Complaint that Capella's differential treatment based on race was discriminatory to Ammons and others in the department. *A. 18, ¶ 18.* Capella is certainly not confused about this fact since it has been able to articulate in detail the alleged discrimination. *Respondent's Br. Pg. 11-12.* Capella also does not gain any traction by claiming that a Complaint alleging more than one theory of liability is too speculative. See *Casey v. American Bridge Co. of New Jersey*, 95 Minn.11, 103 N.W. 623 (1905).

Furthermore, whether Capella discriminated "for" or "against" Ammons is a false distinction. "Discriminate", as defined by the MHRA and interpreted by courts, means to "segregate" or "separate", a distinction in treatment of individuals based upon impermissible or irrelevant factors. See Minn.Stat. § 363A.03 Subd.

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allegations of conscious parallelism and conspiracy. No such gap exists here. In fact, Capella does not claim it is lacking facts but that the facts as alleged make the legal allegation unclear. But, both the facts and legal allegations of the Complaint provide the specific basis of Bahr's retaliation claim.

[3] Contrary to Capella's claims, Bahr did respond to its claimed confusion over who was being discriminated for or against by Capella's conduct at the trial court. See *Bahr's Memorandum in Opposition to Defendant's Motion to Dismiss,* pg. 13-14.

13; *City of Minneapolis v. Richardson*, 307 Minn. 80, 239 N.W.2d 197 (1976). The MHRA further prohibits an employer, because of race, to discriminate with respect to the terms, conditions or privileges of employment. Minn.Stat. § 363A.08, Subd.2.[4] Bahr's Complaint alleges that Capella did discriminate based on race. It made a distinction in the terms and conditions of employment afforded employees based on race. Specifically, Ammons did not receive the full benefit of assistance in improving her performance and her co-workers were treated more harshly and were subjected to Ammons continued poor performance because of Ammons race. Even under Capella's strict pleading standard, Bahr's Complaint sufficiently and specifically pleads facts and allegations to withstand its motion to dismiss. But Capella's strict pleading standard is not what is legally required as a matter of pleading.

As a matter of pleading, to withstand a motion to dismiss, a plaintiff must simply allege facts that raise a right to relief. This, Bahr has done. She is not required, as Capella seems to claim, to plead a prima facie case for her retaliation claim, let alone for the underlying discrimination claim. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506-510-11 (2002) ("The prima facie case...is an evidentiary standard, not a pleading requirement".) Bahr is likewise not required to defend the

[4] The trial court and Capella ignore this form of discrimination. See *A. 9-10.*

merits of her claim at this stage. See *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn.1980).[5]

Not only does Capella apply an incorrect standard for general pleading but it also applies an incorrect standard for pleading a claim of retaliation.

B. Bahr's Complaint Sufficiently Alleges Retaliation

As set forth above and in her opening brief, Bahr sufficiently alleged retaliation. Nevertheless, Capella claims Bahr's Complaint is insufficient. For example, Capella tries to entangle the merits of the underlying discrimination claim with Bahr's retaliation claim so if the discrimination claim fails so too does the retaliation claim. But, a retaliation claim and the underlying claim are analytically divorced. *Wallace v. DGT Operations, Inc.*, 442 F.3d 112, 118 (8th Cir. 2006). A claim for retaliation is different and distinct from a claim of discrimination. Each is separately delineated within the MHRA, aimed at different conduct, with distinct elements required to be proved. See *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189, 1195 (8th Cir.2001). The merits of the discrimination claim simply have no affect on the retaliation claim. Indeed, in *Wallace*, the Eighth Circuit explained that only in the most extreme, "narrow category" of cases, where the underlying claim is frivolous could it ever have a possible affect on the retaliation claim:

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[5] *Twombly* has done nothing to change these principles. The court in *Twombly* stated that by its decision it was not "apply[ing] any heightened pleading standard." *Twombly*, 127 S.Ct. at 1973 n.4. (citations omitted); *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir.2008 ("*Bell Atlantic* must not be overread).

> if a plaintiff's underlying claim is frivolous, a reasonable fact finder could infer that the plaintiff knew the claim was frivolous and that the plaintiff did not bring the claim in good faith, but merely raised the underlying claim as a device to prevent or delay an anticipated adverse action. ...In such a case, the failure of the underlying claim would necessarily be intertwined with evidence of a pre-existing basis for the adverse action, and therefore, not be analytically severable from the claim of retaliation or the employer's proffered reason for the termination.

Wallace, 442 F.3d at 1118 n.1.

In *Wallace*, although plaintiff's harassment claim was dismissed on summary judgment, the court did not find the allegations of harassment to fall into "this narrow category of frivolous claims. As a result, the failure of "Wallace's underlying claims has no bearing on our analysis of the retaliation claims in this case." *Id.* The underlying claim in this case also does not fall into the narrow category of "frivolous" claims. Therefore, like the court found in *Wallace*, the success or failure of the discrimination claim has no bearing on this Court's analysis of the retaliation claim.

Next, Capella ignores the actual allegations of Bahr's Complaint and claims it simply alleged that favoring or disfavoring Ammons was discriminatory. According to Capella, "[t]he trial court, however, does not have to accept this "legal conclusion." *Respondent's Br. Pg. 13.* Taking this argument a step further, Capella argues Bahr could have just as easily argued that she was terminated after professing she was a Green Bay Packer fan and that "packerism" is a protected class. *Id.*

First, as the facts alleged show, Bahr's Complaint is not simply based on legal conclusions or "labels". Second, Capella's "packerism" analogy is equally infirm. Bahr argues that to oppose a practice forbidden under the Act the complained of conduct should either be an actual violation or a type of conduct that is unlawful. See *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 266 N.W.2d 599 (2003). Therefore, simply alleging "packerism" would not be sufficient. While persons living in Minnesota who are Packer fans may have a long history of suffering harassment and discrimination in this State, the legislature has not yet recognized them as a protected class under the MHRA. And, it is fair to say that any reasonable Minnesotan knows a Packer fan does not enjoy any such protected status. Race, on the other hand, has been a protected status since the MHRA was enacted.

Finally, Capella argues that Bahr is claiming that she should simply be allowed to allege discrimination and that a reviewing court applying Rule 12 should accept the allegation and not examine the Complaint. Again, Capella takes great liberty with Bahr's position. In the referenced footnote, Bahr argued that her plain reading of the Act –that does not require an examination of the plaintiff's complaint of discrimination- is consistent with the Act's policy. When referring to "complaint" she was referring to the report of discrimination not the pleading.

Despite Capella's continued attempts to confuse this matter, Bahr's allegations are clear and specific. Rather than demonstrate any confusion, its efforts only demonstrate its understanding of Bahr's allegations.

II. BAHR ENGAGED IN STATUTORILY PROTECTED CONDUCT

A. According to the Plain Language of the MHRA- Bahr Opposed a Practice Forbidden Under the Act

Bahr argues the plain language of the MHRA simply means a plaintiff need only allege opposition to a practice forbidden under the Act. Bahr opposed discrimination based on race which is a practice forbidden under the Act. Minn.Stat. § 363A.08, Subd. 2. Bahr's Complaint sufficiently alleges statutorily protected activity. Bahr also argues that opposition to a practice the employee has a good faith reasonable belief to be forbidden is also included in the plain language of the Act. Contrary to Capella's argument, this does not require anything to be read into the Act. A plaintiff who has a reasonable, good faith belief that conduct forbidden under the Act has occurred and opposes it, has opposed a practice forbidden under the Act. *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 689 (D.Minn. 1977).

Capella, nevertheless, argues that the plain language of the MHRA essentially requires a plaintiff to allege that the underlying conduct is an actual forbidden practice- i.e. allege a prima facie case for the underlying conduct. That is, at the same time Capella recognizes the MHRA does not define the phrase at issue here- opposing a forbidden practice- it and the trial court simply decided that it means a plaintiff must prove an actual violation and plead a prima facie case of discrimination.

Capella's argument has many flaws, starting with the fact that the phrase at issue is not defined by the MHRA. This Court has made clear that when the MHRA does not define a phrase or term it will seek guidance in federal anti-discrimination interpretations when the state law provisions in question are similar to provisions of the federal statutes. *Gee v. Minnesota State Colleges and Universities,* 700 N.W.2d 548, 553 (Minn.App.2005) (citations omitted) (relying on federal law where MHRA did not define "major life activities"); *Continental Can Co., Inc. v. State,* 297 N.W.2d 241 (Minn. 1980) (relying on federal case law to create definition of sexual harassment which was not defined by the MHRA.)[6] The MHRA and Title VII, with respect to retaliation, are essentially identical. When federal cases are examined it is clear a plaintiff need not establish the underlying conduct was an actual violation. See *Bahr's Opening Brief Pg. 31-34; Infra Section II B(3)(b).* Therefore, Capella's long and detailed analysis of adverse action cases is unnecessary. The cases involve direct claims of discrimination where the plaintiff's did not allege or could not establish they suffered adverse action. But that is not the case here. No matter how hard Capella tries to obfuscate the standards of liability- a plaintiff alleging retaliation must only plead sufficient facts to establish retaliation not that of the underlying claim as well.

[6] The definition used in *Continental Can* was adopted by the legislature two years later. See Minn.Stat. § 363.01, Subd 10a (3) (1982). And then was later removed by amendment. 2001 Minn.Laws, ch. 194 § 1 at 724.

Capella also attempts to refute Bahr's argument that placing or failing to place an employee on a PIP could be adverse. In support of this argument, Capella (and trial court) cites *Cullom v. Brown,* 209 F.3d 1035 (7th Cir. 2000). Capella argues *Cullom* is just like this case because the plaintiff in *Cullom* claimed he was discriminated against because he was overrated in his performance evaluations and not placed on a PIP. The court determined that as a matter of law this was not adverse action. *Cullom*, 209 F.3d at 1041. First, the plaintiff in *Cullom* made a direct claim of discrimination. Bahr has alleged retaliation; discrimination is just the underlying conduct she opposed. Proof of retaliation is not the same as a direct claim of discrimination. See *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189, 1195 (8th Cir.2001). Indeed, the thrust of Bahr's claim, unlike the plaintiff in *Cullom*, is that she was fired for opposing discrimination. The plaintiff in *Cullom*, on the other hand, was claiming that he was discriminated against.

Capella also attempts to distinguish *Vaughn v. Edel,* 918 F.2d 517 (5th Cir.1990) to further support the trial court's holding that placing or not placing an employee on a PIP is adverse action. But, the court in *Vaughn* found the failure of an employer to put an employee on a PIP could be adverse action. Capella still criticizes *Vaughn* on the basis that, unlike Ammons, the plaintiff in *Vaughn* was given no warning about her performance. Ammons, Capella claims, was given notice and help. The facts show, however, that Bahr wanted to provide Ammons with a proper PIP with specific performance issues and to "give her a fair

opportunity to improve" as she had with others but was not permitted to do so. This is like *Vaughn*: Capella denied Ammons the *same opportunity to improve* her performance and "ignored its own procedures for a racial reason, however benign that reason may initially appear to be." *Vaughn*, 918 F.2d at 522-23. Capella's also tries to distinguish *Vaughn* based on the fact that the employee in that case was ultimately terminated. The court in *Vaughn* specifically held that the ultimate decision of firing the plaintiff was not material because "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.* at 523.

In sum, Bahr argues that the language of the MHRA is, at a minimum, ambiguous, necessitating an examination of its legislative intent. The intent should also be examined because the interpretation offered by Capella leads to an absurd result. *Anker v. Little*, 541 N.W.2d 333, 336 (Minn.App.1995).

Capella contends, however, it does not understand how or what words or phrase are or even could be considered ambiguous and therefore, the intent of the legislature need not be examined. Capella's own arguments make it clear what the ambiguous phrase is: oppose a practice forbidden under the Act. The parties have demonstrated that the phrase is susceptible to different readings. Capella argues that if there is ambiguity, the good faith standard is not appropriate because

it is not set forth in the plain language of the Act, is not supported by public policy and has not been applied by Minnesota courts. Capella is wrong.

B. The Good Faith Standard is Consistent with the Purpose of the MHRA, Public Policy, Case Law and the Department of Human Rights Application

The good faith standard is consistent with the MHRA's purpose of ridding the workplace of discrimination while at the same time preventing wholly unfounded claims. It permits opposition without chilling employee opposition to improper discrimination by imposing a requirement that the employee be legally correct in alleging discrimination in order for that opposition to be protected. *Viktron/LIKA v. Labor Commission*, 38 P.3d 993, 996 (Utah.App. 2001); *Hanlon v. Chambers*, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995) (sexual harassment "often does not rise to the level of actionability until after there has been a significant accumulation of incidents. Both employees and employers would benefit from a standard that encourages harassment employees to come forward early, well before the ephemeral line of legal liability has been crossed, in order to root out the problem before it grows into an unmanageable and costly crisis.") . It is also consistent with the mandate that the Act be construed broadly. Minn.Stat. § 363A.04. It is consistent with state and federal case law and with Minnesota's long history of providing the same or broader protections than federal law. And, it is consistent with the standard applied by the Department of Human Rights. Despite all of this, Capella argues against the application of the good faith

standard even though it works to promote a policy objective it supports. Capella's arguments fail on every front.

1. The Good Faith Standard is Consistent with the Language of the MHRA

Capella first argues that the retaliation provision of the MHRA only refers to actions forbidden by the Act, not to actions that are reasonably believed to be forbidden. Bahr argues that the good faith standard is already within the Act and does not need to be "read into" it. Again, Bahr argues that when a person has a good faith belief that the complained of conduct is forbidden, they are opposing a practice forbidden under the Act. *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 689 (D.Minn. 1977). Capella criticizes Bahr's reliance on *Hearth* because that case addressed Title VII. As already explained, consideration of federal court decisions is appropriate and common practice with regard to interpreting the MHRA.

Capella next argues that statutes that actually do contain good faith language still require the complained of activity to in fact be illegal. Capella is wrong again. See *Hedglin v. City of Wilmar*, 582 N.W.2d 897, 902 (Minn.1998) (under whistleblower Act "[i]t is irrelevant whether there were any actual violations; the only requirement is that the reports of state law violations were made in good faith.") Then, Capella argues that, like Minn.Stat. § 181.932 and Minn. §626.557, the legislature could have put "good faith" into the MHRA- but it didn't. This argument, however, is not persuasive when the timing and

development of the good faith standard in civil rights cases is considered along with the enactment of Minn.Stat. § 181.932 and Minn.Stat. § 626.557. The MHRA was enacted in 1955[7] and Title VII in 1964. By 1977 courts were applying the good faith standard to the opposition language. *Hearth v. Metropolitan Transit Commission*, 436 F.Supp. 685, 689 (D.Minn. 1977). Then, Minn.Stat. § 626.557[8] and Minn.Stat. 181.932[9] were enacted in 1986 and 1987, respectively. Each specifically included the "good faith". The fact that these statutes included this language and the MHRA did not, however, loses significance when courts had already been interpreting the opposition language to mean good faith for years before the other statutes were enacted. There simply was no need to include the good faith language since it was already logically being interpreted to include that language. Indeed, it is very possible those statutes borrowed from those cases in drafting the later legislation.

Finally, relying on *Womack v. City of Minneapolis,* A06-11, 2006 WL 2530401 (Minn.App. Sept. 5, 2006), Capella, like the trial court, claims that simply alleging unlawful discrimination when no discrimination has occurred does not constitute protected activity. As already set forth in her opening brief, reliance on *Womack* is erroneous. *Appellant's Opening Br. Pgs 39-40.*

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[7] Act of April 19, 1955, ch. 516 Minn.Laws 802, 802-12.
[8] 1986 Minn.Laws ch. 444.
[9] 1987 Minn.Laws ch. 76 § 2

2. The Good Faith Standard is Consistent with Public Policy

Capella's second argument that public policy does not support the good faith standard is also wrong. While recognizing that the public policy of the Act is to secure freedom from discrimination, Capella also notes it is the policy of the Act to protect all persons from wholly unfounded charges of discrimination. Minn.Stat. § 363A.02, Subd.1(b). Capella seems to argue that protection from wholly unfounded charges outweighs ridding workplaces of discrimination and that the best way to serve that policy is to dismiss retaliation actions when the underlying discriminatory conduct does not reach the level of an actual violation of the MHRA. *Respondent's Br. Pg. 32.* Moreover, Capella argues that the good faith standard requires an impermissible extension of the law that is not within this Court's power.

To argue that the policy of protecting against unfounded complaints operates in a way to eviscerate other long standing principles of the MHRA is illogical. Arguably, the primary purpose of the MHRA is to secure freedom from discrimination. This is indicated by the language of the Act, its mandate that it be interpreted and construed broadly and by its remedial nature. At a minimum, the Act affords both policy interests equal reverence and therefore one does not trump the other.

Furthermore, the policy relied on by Capella makes clear it is not intended to protect against claims of retaliation where the plaintiff opposed a practice she believed in good faith was a violation of the MHRA. That is, the policy interest of

protecting against a wholly unfounded charge is not meant to protect against any charge but a *wholly unfounded* charge. The plain and ordinary meaning of "wholly" is "completely; entirely" and the plain meaning of "unfounded" is "not based on fact or sound evidence; groundless."[10] See Minn.Stat. § 645.08(1) ("words and phrases are construed according to rules of grammar and according to their common and approved usage.") As the case law tells, an employee with a good faith belief they have opposed a practice forbidden under the Act has a sound basis for their claim. And, this is so, even when the conduct opposed is not an actual violation of the Act. Therefore, an employee who makes a claim of retaliation based on opposition to conduct they have a good faith belief violates the Act has *not* made a *wholly unfounded* claim. As a result, contrary to Capella's argument, dismissing a claim because the underlying conduct is not an actual violation does not promote the MHRA's policy interest of protecting against *wholly unfounded* claims. In fact, it works against it since a claim of retaliation based on a good faith belief is not wholly unfounded.

Finally, to claim that applying the good faith standard is an impermissible extension of the law outside the purview of this Court's authority is equally misguided. As the MHRA, state and federal case law and the Department of Human Rights make clear, application of the good faith standard is not a stretch or extension of the law. And, it is well within this Court's authority to interpret and apply the law accordingly. See *Gee v. Minnesota State Colleges and Universities*,

[10] The American Heritage Dictionary of the English Language (4th ed. 2000).

700 N.W.2d 548, 553 (Minn.App.2005) (relying on and applying federal cases and standards where MHRA did not define "major life activities".) This Court is an error correcting court and it is an error made by the trial court that Bahr asks this Court to correct. The trial court erred in its interpretation of the MHRA. This court has a long history of interpreting, reading and applying statutes and reversing decisions that incorrectly apply the law. See *Gee*, 700 N.W.2d 548. Confirming that the application of the good faith standard is appropriate in retaliation cases is within this Court's power.

Capella also ignores other interests served by and issues resolved by the good faith standard. One way to rid the workplace of discrimination and harassment is to prevent it from happening and/or address it as soon as it does happen. Courts have found one of the best ways to accomplish this is through employees reporting inappropriate conduct immediately. See *Burlington Industries Inc., v. Ellerth,* 524 U.S. 724 (1998); *City of Boca Raton v. Faragher,* 524 U.S. 775 (1998). Indeed, in sexual harassment cases, reporting inappropriate conduct to the employer is usually a requirement to trigger the employer's duty to act. Employees are held to reporting conduct immediately under the assurance that the anti-retaliation provision will provide the employee protection. Under the trial court's reasoning, employees would be stripped of the Act's protection and essentially be left to report at their own peril. Such a result is antithetical to the plain language of the MHRA, its purpose and public policy.

3. Minnesota State and Federal Courts and the Department of Human Rights Apply the Good Faith Standard

Third, and finally, Capella argues that Minnesota has not applied the good faith standard. Capella over-reads and ignores case law to come to this conclusion. With regard to state cases, it attempts to distinguish them on the basis that they do not specifically make reference to or hold that the good faith standard applies to the MHRA. With regard to Eighth Circuit cases, it either argues they are not persuasive for purposes of analyzing the MHRA or attempts to distinguish them. Capella also all but ignores the fact that Department of Human Rights applies the standard.

a. The Minnesota Court of Appeals Has Applied the Good Faith Standard

Capella argues that the state cases cited by Bahr (and the Department of Human Rights) or any appellate case for that matter, have not held the good faith standard applies to the MHRA. No court, Capella claims, has ever even discussed it. While Bahr is uncertain what Capella means by "discuss", the reality is that this court has applied the good faith standard to cases under the MHRA.

In *Jones v Minneapolis Public Schools,* No. C1-02-1523, 2003 WL 1962062 (Minn.App. April 29, 2003), the court first noted that "In analyzing MHRA reprisal claims, we apply federal case law discussing retaliation claims under Title VII of the Civil Rights Act." at * 3. Relying on *Evans v. Kansas City, Missouri School District*, 65 F.3d 98, 100 (8th Cir.1995), the court found that the plaintiff *may establish protected activity by showing that he had a good-faith*

reasonable belief that respondent was engaging in illegal discrimination. *Id.* The court determined that there was a question of fact whether the plaintiff's report arose from a good-faith belief that illegal discrimination was taking place. *Id.* Clearly, *Jones* relied on and applied the good faith standard to the MHRA retaliation claim.

Capella further criticizes *Jones'* reliance on *Evans v. Kansas City, Missouri School District,* 65 F.3d 98 (8th Cir.1995), because the court in *Evans* decided that the plaintiff's opposition was "unfounded and unreasonable as a matter of law" and therefore not "remediable under Title VII." See *Evans*, 65 F.3d at 100-01. First, it should be noted that the record in *Evans* was developed through discovery and a trial. The Eighth Circuit's decision was not made at the motion to dismiss stage. Furthermore, the plaintiff in *Evans* had complained about discrimination that was not of a type covered by Title VII: "the genesis of Evans' claims lies *not with any allegation of a discriminatory employment practice*, but rather with an allegation that Doctor Coopers' efforts to comply with a desegregation directive disregarded the needs of the black student population of Southeast." *Id* at 101-02 (emphasis added). *Evans* does not support Capella's argument but does support Bahr's- a plaintiff need only a good faith reasonable belief a violation of the MHRA occurred.

Capella also criticizes Bahr's reliance on *Loew v. Dodge County,* No. A05-1574, 2006 WL 1229641 (Minn.App. May 9, 2006) because the court did not expressly hold that good faith standard applied. But the court in *Loew* reversed

the lower court for its failure to analyze whether Loew had a good-faith reasonable belief that she was opposing sex discrimination. *Loew* at *8.

Capella also argues that *State v. Wallin*, No. C8-96-1542, 1997 WL 53016 (Minn.App. Feb. 11, 1997), is "irrelevant for purposes of our discussion" because the court did not in any way discuss the good faith belief issue now before this court. *Respondent's Br. 35, n. 8.* But, the court's decision tells otherwise. Like the other cases, the court in *Wallin* cited and relied on the good faith standard to reverse the lower court's determination that the underlying violation be an actual violation.

Next, Capella criticizes *Olchefski v. Star-Tribune*, CX-94-1988, 1995 WL 70190 (Minn.App. Feb. 21, 1995) because in that case the court's sole support for its decision was based on *Manoharan v. Columbia University College of Physicians and Surgeons*, 842 F.2d 590 (2nd Cir. 1988). According to Capella, the court in *Manoharan* "summarily dismissed the plaintiff's claim" because the plaintiff did not have a good faith reasonable belief of prohibited activity." *Respondent's Br. Pg. 43.* Capella's claim the case was "summarily" dismissed is wrong. The plaintiff's claim in *Manoharan* was *dismissed after a four day trial.* *Manoharan*, 65 F.3d at 593. Furthermore, the facts show that plaintiff had not opposed something that was not within the purview of Title VII. *Id.* at 595.

Capella's criticisms and attempts to distinguish the cases cited by the Commissioner of the Department of Human Rights are also unpersuasive. The Commissioner cited several state cases where the court's decision makes clear that

whether the conduct opposed was actually unlawful discrimination did not matter. Capella, nevertheless, disagrees. For example, it argues *Potter v. Ernst & Young, LLP* 622 N.W.2d 141 (Minn.App. 2001) is distinguishable because the employer admitted the report was formal. That fact is immaterial. The underlying discrimination claim was dismissed at summary judgment along with the reprisal claim. The plaintiff only appealed the dismissal of the retaliation claim and the court reversed that dismissal without consideration of the merits of the underlying claim. *Webb v. Xcel Energy, Inc.*, No. A06-562, 2007 WL 1412852 (Minn.App. May 15, 2007) is similarly persuasive for Bahr's argument because the court's decision was not based on the merits of the underlying claim. Instead, the court found that the plaintiff's first report was not protected conduct because it wasn't clear what she was opposing.

Clearly, this Court has discussed and applied the good faith standard to MHRA retaliation claims and does not require the underlying violation actually be a violation of the Act.

Finally, Minnesota is not alone in applying the good faith standard to its human rights law. Several other states with human rights laws similar or identical to Title VII and the MHRA (that don't contain any "good faith" language) have done so. See *Carmona v. Resorts Int'l Hotel*, 915 A.2d 518, 528-30 (N.J. 2007); *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599, 605 (2003); *Viktron/LIKA v. Labor Commission*, 38 P.3d 993, 996 (Utah App. 2001); *Cox v. Smith Inc. v. Cook*, 974 S.W.2d 217 (Tex.App.1998); *Hanlon v. Chambers*, 195

W.Va. 99, 464 S.E.2d 741, 754 (1995); *Conrad v. Szabo*, 198 W.Va. 362, 480 S.E.2d 801, 814-15 (W.Va. 1996) (same); *McCabe v. Board of Johnson County Comm'rs*, 5 Kan.App.2d 232, 615 P.2d 780 (1980).

b. The Eighth Circuit Applies the Good Faith Standard

When analyzing cases brought under the MHRA, Minnesota courts will apply principles developed in the adjudication of claims arising under Title VII where the provisions are similar. See *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (1986); *Carlson v. Indep. Sch. Dist. No. 623*, 392 N.W.2d 216, 220 (Minn.1986). The Eighth Circuit has made it very clear: to prove a claim of retaliation the plaintiff employee does not need to show that the conduct opposed was in fact discriminatory. Instead, the plaintiff must show a reasonable good faith belief that the conduct opposed violated the law. While Capella recognizes that this court will look to federal case law and recognizes value in the federal good faith standard ("there is a significant policy reason for requiring a reasonable, good faith belief that the opposed action was unlawful.")[11] it argues the Court should make it an objective and scrutinizing standard.

Bahr agrees with Capella that the good faith standard has an objective component to it, but it is not a "scrutinizing" or heightened standard. There is nothing in Eighth Circuit case law that indicates a heightened standard let alone a case that even uses that word. For example, in *Buettner v. Arch Coal Sales Co.,*

[11] *Respondent's Br. Pg. 43.*

Inc., 216 F.3d 707 (8th Cir.2000) the plaintiff testified in her deposition that she thought it was "very discriminatory for Panzarino to say that women and minorities don't belong in the coal business." *Buettner*, 216 F.3d at 714-15. The court held "without determining whether Panzarino's comment would be sufficient to prove discrimination, we believe *Buettner* could demonstrate a good faith, reasonable belief that the challenged conduct violated the law." *Id.* at 715. Similarly, in *Wallace*, the plaintiff alleged that her supervisor showed her a sexually inappropriate cartoon and made comments about her body. While the reported conduct may not have constituted harassment under the law, the report was sufficient to support a claim of retaliation. *Buettner* and *Wallace*, as well as other Eighth Circuit decisions, make clear the good faith standard is not demanding. Instead, the Court seems to find opposition to a forbidden practice where the conduct complained of is either in fact unlawful *or of a type* that is unlawful.

Capella's reliance on federal cases in claiming that even federal courts do not permit a plaintiff to avoid scrutiny of a retaliation claim by merely claiming a belief of illegal conduct is no more persuasive. Bahr has never suggested that such a standard apply. And, Bahr's Complaint certainly does far more than merely claim discrimination.

Capella also unsuccessfully tries to distinguish some of the federal cases cited by Bahr. For example, Capella claims *Buettner* does not support Bahr's argument based on the fact that the plaintiff's retaliation claim failed because she

could not establish a question of fact that she suffered adverse action. This is further support, according to Capella, that Bahr's claim should fail because she did not allege adverse action. Since Capella does not dispute that Bahr pled adverse action for purposes of her retaliation claim, the only adverse action Capella could possibly argue was not alleged is adverse action as a result of Capella's discrimination against Ammons. This is not necessary. Capella's persistent attempt to reframe Bahr's retaliation claim as one for discrimination to avoid liability is obvious and lacks any merit.

Capella makes the same error relying on *Garrett v. Celanese Corp.*, No. 3:02-cv-1485, 2003 WL 22234917 (N.D.Tex.. Aug. 28, 2003). Like *Buettner*, the plaintiff's case in *Garrett* failed because the plaintiff herself had not suffered adverse action. *Garrett*, at *1. The court's holding had nothing to do with the merits of the underlying conduct giving rise to the retaliation claim.

Capella also claims that Bahr ignored the trial court's footnote wherein it claimed, Bahr's assertion that Capella was discriminating against Ammons when it did not PIP her is clearly unreasonable as a matter of law and such a claim cannot survive a motion to dismiss. *A. 13.* The trial court cited to and relied on *Jackson v. City of Chicago*, 38 F.Supp.2d 648, 650 (N.D.Ill.1999) in support of this contention. Bahr did not ignore this finding by the Court. See *Appellant's Opening Br. Pg. 35-36.* Furthermore, *Jackson*, like the other cases cited by the trial court and Capella, is of no persuasive value. To understand the holding in *Jackson*, one must examine the holding in the plaintiff's first lawsuit. Jackson

first brought a claim of retaliation in 1996 based on reports and grievances filed with his union. The Court first noted that "the critical inquiry is the plaintiff's subjective belief that his employer is acting in ways these statutes forbid, not the objective fact of discrimination." The court found that the grievances upon which the plaintiff relied as the basis for his retaliation claim said "nothing about discrimination." *Jackson v. City of Chicago*, No. 96-C-3636, 1996 WL 734701 at *4-5(N.D.Ill. Dec. 18, 1996). The grievances never "allege[] that this was discriminatory or in any way contrary to Title VII or ADEA discrimination." *Jackson*, 1996 WL 734701 at *3. Therefore, there was simply no way for Plaintiff to claim he reasonably believed he was challenging discriminatory conduct." *Id.* at *4. In the second retaliation lawsuit (the case upon which the trial court in this case relied) the court held that retaliation claim was barred by *Res Judicata* and collateral estoppel because the second retaliation claim was based on the same union grievances as relied on in the first lawsuit. The facts in *Jackson* are a far cry from the facts in this case. Bahr repeatedly told her employer that she believed its treatment of Ammons was unfair and *discriminatory* based on race.

Finally, on appeal, Capella relies on *Clark County School Board v. Breeden,* 532 U.S. 268 (2001), to further support the trial court's decision that no reasonable person could have believed Ammons was being discriminated against. *Clark*, however, is procedurally distinct as it was decided at the summary judgment stage. And, if one were to follow Capella's reasoning, *Clark* is of

limited value since the Court did not directly discuss or hold that the good faith standard applied to Title VII. *Respondent's Br. Pg. 37.*

c. The Department of Human Rights Applies the Good Faith Standard

The Commissioner of the Department of Human Rights has made it clear that the Department applies the good faith standard. As the Minnesota Supreme Court recently stated, the Commissioner of the Department of Human Rights statements regarding the Act and its meaning are to be given deference when interpreting it. *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 567 n.6 (Minn. 2008).

4. Whether an Employee Opposed a Practice Forbidden Under the Act is a Question of Law and Fact

Capella contends that the question of whether an employee opposed a practice is a question of law, not fact. Bahr argues the question is, at a minimum, a mixed question of law and fact. The appropriate analysis is akin to that used in whistleblower cases. In that context, the court may determine whether certain kinds of conduct do or do not constitute a report as a matter of law. But the question of "good faith" remains a question of fact for a jury to decide. *Hayes v. Dapper*, A07-1878, 2008 WL 4301018 *4 (Sept. 23, 2008, Minn.App.) (citing *City of Otsego v. Cokley*, 623 N.W.2d 625, 630 (Minn.App. 2001)) (whether an employee made a report in good faith is a question of fact.)

Therefore, in this context, the question of whether the conduct opposed is an actual violation or a type of violation of the MHRA may be determined as a

matter of law. The question of "good faith", however, is a question of fact for a jury to decide.

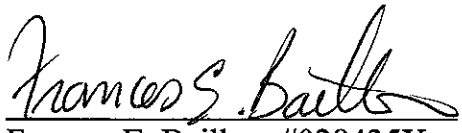
CONCLUSION

Viewing the 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 MHRA, its policy, case law and the Department of Human Rights, Bahr's Complaint is sufficient and dismissal was not appropriate. The judgment must therefore be reversed and the case remanded.

Respectfully submitted,

Dated this 20th day of October, 2008

HALUNEN & ASSOCIATES



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STATE OF MINNESOTA

IN COURT OF APPEALS

Case No. A08-1367

Elen Bahr,

Appellant,

v.

CERTIFICATE OF WORD COUNT COMPLIANCE

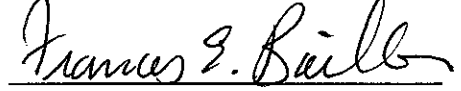
Capella University.,

Respondent.

I, Frances E. Baillon, one of the counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's Reply 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 6,909 words.

Dated this 20th day of October 2008.

HALUNEN & ASSOCIATES



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