

NO. A08-1367

STATE OF MINNESOTA

In Supreme Court

Elen Bahr,

Respondent,

vs.

Capella University,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Did respondent establish that, for purposes of a retaliation claim under the MHRA, “oppos[ing] a practice forbidden under [the Act]” includes an employee who opposes a type of practice or a practice she reasonably believes in good faith is forbidden?

The court of appeals held that the good faith standard was consistent with the plain language of the Act, its intent to rid the workplace of discrimination and case law.

APPOSITE AUTHORITIES:

Minn.Stat. § 363A.04

Minn.Stat. § 363A.15(1)

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

2. Did appellant establish that, for purposes of a retaliation claim under the MHRA, “oppos[ing] a practice forbidden under [the Act]” requires an employee oppose a practice that is an actual violation of the Act-meeting the prima facie elements- and that this interpretation is consistent with the language of the MHRA, its legislative mandate to be liberally construed and its intent?

The court of appeals held that appellant’s actual violation standard is not consistent with the purpose and intent of the Act or the mandate to be liberally construe the Act.

APPOSITE AUTHORITIES:

Minn.Stat. § 363A.02, subd.1(a)(1)

Minn.Stat. § 363A.04

Wallace v. DTG Operations, Inc., 442 F.3d 1112 (8th Cir. 2006)

3. Did appellant properly present and establish that the standard to determine an employee's objective belief that a practice is forbidden by the MHRA is scrutinizing and must be measured against "applicable substantive law"?

The court of appeals held that a forbidden practice is one the employee believes in good faith is forbidden.

APPOSITE AUTHORITIES:

Cummings v. Koehnen, 568 N.W.2d 418 (Minn.1997)
Peterson v. Scott County, 406 F.3d 515 (8th Cir. 2005)
Crumpacker v. Kansas Dep't of Human Res., 338 F.3d 1163(10th Cir. 2003)

4. Did appellant establish as a matter of law that for purposes of statutorily protected conduct for a claim of retaliation, no reasonable person could have believed an employer's hands off approach toward an employee and failure to offer equal opportunities to improve her performance because of her race was discrimination and a forbidden practice under the MHRA?

The court of appeals held that the facts alleged sufficiently pled statutorily protected conduct as case law recognized that such conduct could be discriminatory. The court of appeals did not adopt this standard as it unfairly requires employees to know the evolving standards of liability.

APPOSITE AUTHORITIES:

Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990)

STATEMENT OF THE CASE

This case arises out of Capella University's termination of its employee Elen Bahr after she opposed and refused to engage in race discrimination.

Hennepin County District Court Judge Denise D. Reilly determined Bahr failed to state a claim of retaliation under the Minnesota Human Rights Act ("MHRA") because for purposes of a Rule 12 motion, a plaintiff must plead facts showing that the conduct she opposed was an actual violation of the MHRA, meeting the prima facie elements.

Bahr appealed from the district court judgment dismissing her retaliation claim. The court of appeals reversed the district court judgment, holding, *inter alia*, that statutorily protected conduct is sufficiently pled where facts alleged support a good-faith reasonable belief that the conduct opposed constituted a violation of the MHRA. Therefore, the conduct opposed does not have to in fact be a violation.

This Court granted Capella's request for further review, which raised two issues: 1) whether the MHRA protects employees who complain of conduct they have a good faith reasonable belief is forbidden under the Act but it is not an actual violation, and 2) whether a professed good faith belief may be held objectively unreasonable as a matter of law. For the first time, Capella also now asks this Court to determine whether a PIP constitutes an unfair employment practice as defined by Minn.Stat. § 363A.08, subd. 2(3). Capella's petition for

review does not reference this section of the MHRRA this issue was not specifically raised and is therefore not properly before this Court.

STATEMENT OF THE FACTS

Bahr began her employment with Capella in its communications department in February 2006. (A. 1, ¶ 3.) By August 2006, Bahr was promoted to a newly created position of Senior Communications manager. (*Id.*)

A. Bahr Begins Managing LA and Tries to Address Her Deficient Performance

In June 2006, Bahr assumed management for LA, an African American woman who had been transferred into Bahr's department after her job was eliminated. (A. 2, ¶ 4.)

By September 2006, it was apparent to Bahr that LA was failing to meet expectations in her performance. (A. 2, ¶ 5.) As a result, Bahr provided informal coaching in project management skills in an attempt to boost LA's performance. (*Id.*) Despite the coaching, LA 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 with LA to improve her performance. (A. 2, ¶ 6.) Bahr reported her concerns to and sought the assistance of Nichole Scott, Senior HR Generalist for Capella. (*Id.*)

In February 2007, Bahr met formally with LA about her performance and she documented several areas in which LA struggled. (A. 2, ¶ 7.) Following this meeting, Bahr again communicated her concerns about LA to HR and her fear that LA's poor performance was adversely affecting the entire team. (*Id.*)

On March 6, 2007, Bahr met with LA, again, to discuss performance concerns. (A. 2, ¶ 8.) Bahr raised concerns of LA's lack of attention to detail, knowledge and team involvement. (*Id.*) Bahr took several steps to assist LA, including setting up specific processes to help LA better manage her time and workload and shifting some of LA's duties to another employee. (*Id.*) Both agreed they would meet for thirty minutes each week to monitor LA's performance. (A. 2-3, ¶ 8.) Bahr was committed to helping LA succeed without detracting from the overall needs of the team. (A. 3, ¶ 8.)

At the meeting, Bahr also discussed with LA her discontent with certain team members whom LA found competitive and negative. (A. 3, ¶ 9.)

Bahr encouraged LA to separate personality from work and try to address the situation on her own before Bahr would intervene. (*Id.*) LA 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 LA believed the issue was based on race. (*Id.*)

B. Capella Demands Bahr Treat LA 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 Scott to discuss LA's deficiencies. (A. 3, ¶ 10.) Bahr told the group that LA's poor performance warranted a performance improvement plan (PIP). (*Id.*) Lockner demanded Bahr move slowly with LA and insisted that Bahr could not move forward with any formal PIP. (*Id.*)

This resistance to a PIP was highly unusual. (A. 3, ¶ 11.) Since joining Capella, Bahr had managed two employees through PIPs. (*Id.*) The first was a great success when the worker met all of her goals within 30 days and continued to excel to promotion. (*Id.*) The second was placed on an improvement plan on after Bahr had spent weeks trying to help her manage her issues. (*Id.*) That employee ultimately chose to resign. (*Id.*)

During March and April 2007, Bahr continued to work with LA on her deficiencies and tracked issues as they arose. (A. 3, ¶ 12.) Bahr continued to apprise Scott of LA's performance issues and Bahr's attempts to rehabilitate them. (*Id.*) Bahr reiterated the negative affect LA's poor performance was having on morale and behavior in her department. (*Id.*)

On March 27, 2007, Bahr met with LA, yet again, about the same deficiencies in performance. (A. 4, ¶ 13.) By that time, other team members had expressed their frustrations about LA's poor performance to Bahr. (*Id.*) Team members complained that they had spent wasted time looking for documents that should have been easily accessible had LA tracked and filed the documents accurately. (*Id.*) Bahr had explained the importance of such details several times previously, but LA continually failed to grasp their significance. (*Id.*) Following the meeting, Bahr summarized the conversation to Scott and reiterated her concerns. (*Id.*)

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

Scott cautioned Bahr "to move more slowly on the matter [with LA] than she had ever moved on a performance issue." (A. 4, ¶14.) She was told that LA "has a history" in the organization that was "racially based" and warned that any action could result in a discrimination lawsuit against Capella. (*Id.*) Scott added that LA's situation was known and monitored by the highest levels in the organization, including Mr. Steve Shank, President and CEO of Capella. (*Id.*) 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 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.*) Scott could not answer that question. (*Id.*)

Around this same time, Bahr completed annual performance evaluations for her team members. (A. 4, ¶ 15.) By the end of the week of March 26, Bahr had met with each person, except for LA. (*Id.*) Scott insisted Bahr first send LA's review to her and to the legal department before she shared it with LA. (*Id.*) Bahr did as instructed. (*Id.*)

Capella's review process revealed that LA had received an overall performance rating of 2.5. (A. 5, ¶ 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 LA 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 and LA's annual performance review was delayed for several weeks. (*Id.*)

Following her review of Bahr's first draft of LA's review, Scott instructed Bahr to go back and minimize the performance issues raised. (A. 5, ¶ 17.) Scott was again cryptic about "trying to do the right thing" and providing "balance" to LA's review. (*Id.*) Scott told Bahr, "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 LA and Her White Co-Workers

On April 11, after HR had given their comments, Bahr formally reviewed LA's performance with her but did not discuss an action plan for improvement. (A. 5, ¶ 18.) Afterward, Bahr summarized the meeting to Scott and stated that she was committed to getting back to LA 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 LA. (*Id.*) She told Scott this treatment was unfair and discriminatory to LA and to other employees as no other employee was being treated this way. (*Id.*) Again, Bahr was told not to tell LA that HR and legal were so deeply involved in her review process. (*Id.*)

On April 16, Bahr met with Scott in person and put forward her plan of action for LA. (A. 5, ¶ 19.) Bahr told Scott it was time for LA to know her specific performance issues, the expectations for her job, and be given a reasonable plan for success. (A. 5-6, ¶ 19.) Bahr also reviewed the plan with her supervisor, Brad Frank, and let him and Scott know that she would meet with LA on April 23 to discuss the performance issues and plan. (A. 6, ¶ 19.) Bahr again told Scott and Frank that she believed that the treatment of LA 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. 6, ¶ 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 LA to perform poorly without addressing the issues which reflected upon and affected the work performance level of the entire work team. (A. 6, ¶ 21.) Bahr also knew that LA 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 new department. (A. 6, ¶ 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 LA (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. 6-7, ¶ 23.) Once completed, they would discuss a development plan – *for Bahr*. (A. 7, ¶ 23.)

Bahr asked that the review process include evaluations from people outside of her department as well as from within. (A. 7, ¶ 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 LA was not “equitable” and that HR ought to examine the issues with other employees it helped create when it failed to treat LA in the same manner as other employees. (*Id.*)

F. Bahr Refuses to Discriminate and Treat LA 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 LA. (A. 7, ¶ 25.) She explained that the situation placed her in an ethically compromised situation *and she would no longer treat LA differently than other members of the team because of LA's 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 LA's performance issues. (*Id.*)

On June 12, 2007, Frank asked Bahr how LA was performing. (A. 7, ¶ 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. 7, ¶ 27.) The results showed consistently high rankings of Bahr from her director and her peers. (A. 7-8, ¶ 27.) Her staff on the other hand, ranked Bahr two points lower. (A. 8, ¶ 27.) 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.8, ¶ 28.) Later that day, Scott visited Bahr and told her that the employees notified HR of the conversations Bahr had with them. (*Id.*) 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. 8, ¶ 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. 8, ¶ 30.) Muehlbauer 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. 8, ¶ 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. (*Id.*) She knew that other managers were also given opportunities to work on team dynamic issues. (*Id.*) In fact, Capella had recently hired the firm to work with Events Manager, Tom Clemens for several months to change the dynamic of his work team. (A. 8-9, ¶ 31.)

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. 9, ¶ 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. 9, ¶ 33.) Bahr was stunned as 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 and told Bahr to go home. (A. 9, ¶ 34.)

SUMMARY OF ARGUMENT

This Court has consistently interpreted and applied the MHRA liberally to enforce its primary purpose: freeing the workplace from discrimination. With unwavering fidelity to the language, intent and policy of the MHRA, this Court has interpreted the Act to ensure it protects all citizens of this state from the menace of discrimination and the threat it poses to their civil rights. A crucial weapon in the MHRA's arsenal to battle discrimination is the anti-retaliation provision. Without this Court's continued proper and liberal interpretation of the MHRA, and its anti-retaliation provision, the purpose of the Act will be in jeopardy.

But, Capella asks this Court to turn its back on the language of the Act, the intent of the legislature and decades of jurisprudence. In a tactic often used to avoid liability, Capella tries to make this case about something else. Capella attempts to reframe Bahr's claim of retaliation into one of discrimination. Capella argues that statutorily protected conduct under the MHRA requires an employee oppose discrimination that is an actual violation- a violation that meets the prima facie elements. Therefore, the employee has to plead (and presumably prove at trial) a prima facie case of the underlying conduct they opposed (discrimination) within the prima face case for retaliation. So, Capella devotes an inordinate portion of its brief arguing the elements of discrimination. But this is a case of retaliation.

Retaliation law, as the court of appeals held, is concerned with preventing an employer from punishing an employee who opposes conduct forbidden under the Act. The analysis of a claim for retaliation should not include a determination as to whether the conduct opposed would rise to the level of a prima facie claim for discrimination. The retaliation claim and the underlying conduct complained of, or the forbidden conduct, are analytically divorced. Therefore, the MHRA simply requires the employee to oppose conduct that is a *type of practice* forbidden under the Act or a practice *the employee had a good faith reasonable belief* was forbidden under the Act. This is consistent with, if not mandated by, the language of the MHRA, legislative intent, interpretation applied by the Department of Human Rights and case law. Capella's interpretation, on the other hand, is devoid of any support from the language of the MHRA, legislative intent, and is entirely inconsistent with the Act's purpose and is specifically inconsistent with the anti-retaliation provision.

To rid the workplace of discrimination, employees are encouraged to report discrimination or harassment immediately. Employees are encouraged to report- despite their fear of retaliation- based on the safeguards and protections offered by the anti-retaliation provision. Capella's standard would leave a majority of employees who engage in opposition unprotected. Most employees who oppose discrimination or harassment do not know the specific standards of liability and are encouraged to oppose conduct immediately before it turns into unmanageable liability creating conduct. But, if Capella has its way, those employees will be left

exposed and unprotected from retaliation. Nothing in the MHRA indicates the legislature intended to leave such a significant class of employees unprotected, and it cannot be presumed the legislature intended such an absurd result.

Even if Bahr was required to prove more about the conduct underlying her reports of race discrimination, the district court could not, on a motion to dismiss, determine whether Bahr had reason to believe the conduct was discriminatory or that it was in fact discriminatory under the Act. The court of appeals reversal of the district court's order must be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

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). 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.” *Hebert*, 744 N.W.2d at 229. The rules of pleading instruct that pleadings are to be construed to do substantial justice. Minn.R.Civ.P. 8.06. Accordingly, the pleading must be liberally construed and read as a whole. *Royal Reality Co. v. Lavin*, 69 N.W.2d 667 (1955); *Consumer Grain Co. v. Wm. Lindeke Roller Mills*, 190 N.W. 65 (1922). “Specific facts are not necessary; the statement need only ‘give fair notice of what the...claim is and the grounds upon which rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)).

Neither *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) nor *Ashcroft v. Iqbal*, -- U.S.-- , 129 S.Ct. 1937 (2009), “fast becoming the citation[s] du jour in Rule 12(b)(6) cases,” impact these principles of pleading. *Smith v. Duffy*, 576 F.3d 336, 339-40 (7th Cir. 2009); *Erickson*, 551 U.S. at 93-94 (reaffirming pleading standards under Fed. R. Civ. P. 8(a)(2)).¹ To the extent this Court relies

¹This Court has not always followed United States Supreme Court precedent on federal rules regarding the application of state procedural rules and need not do so now. Compare *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (holding that Rule 702 of the Federal Rules of Evidence did not incorporate the

on these cases the reality is that neither case has altered the pleading standard. Under *Twombly* and *Iqbal*, the plaintiff survives a motion to dismiss when she simply sets forth “factual allegations sufficient to raise the right to relief above the speculative level.” *Twombly*, 550 U.S. at 545. The complaint must allege “only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. This means the plaintiff has pled “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). This plausibility requirement only asks for a pleading that alleges more than “a sheer possibility that a defendant has acted unlawfully.” *Id.* Therefore, a plaintiff need only plead “enough facts to raise a reasonable expectation that discovery will reveal evidence [of the claim]”² or enough facts that when taken as true are “suggestive of illegal conduct.” *Twombly*, 550 U.S. at 564 n. 8. “[O]nce a claim has been stated adequately, it may be supported by showing *any set of facts* consistent with the allegation in the complaint.” *Id.* at 546 (emphasis added).

These cases also have not changed the rule that a pleading need not allege the prima facie elements of discrimination or retaliation because the prima facie case is *not* a pleading standard but an evidentiary standard: “the prima facie case

“Frye” test as a basis for admitting scientific expert testimony) and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn.2000) (rejecting the *Daubert* standard and adopting the *Frye-Mack* standard for Rule 702 of the Minnesota Rules of Evidence).

² *Twombly*, 550 U.S. at 556.

under [*McDonnell Douglas*] is an evidentiary standard- it defines the quantum of proof a plaintiff must present to create a rebuttable presumption of discrimination that shifts the burden to defendant...[u]nder the Federal Rules of Civil Procedure an evidentiary standard is not a proper measure of whether a complaint fails to state a claim.” *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002). There are at least two reasons why applying the prima facie case at the pleading stage is erroneous. First, it fails to recognize that a plaintiff could prove discrimination with direct evidence, never having to address the prima facie case. *Ring*, 984 F.2d at 927 (citing *International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Second, it fails to recognize that the prima facie case varies depending on the facts of a case. *Id.*

Under any standard of pleading, Bahr’s complaint is sufficiently pled. The facts pled not only allege facts “suggestive” of retaliation, but “enough facts to raise a reasonable expectation that discovery will reveal evidence of [retaliation].” *Id.* at 556. The court of appeals reversal of the district court’s order dismissing Bahr’s complaint must be affirmed.

II. THE MHRA PROHIBITS EMPLOYERS FROM RETALIATING AGAINST EMPLOYEES WHO OPPOSE OR REFUSE TO ENGAGE IN RACE DISCRIMINATION

The MHRA declares it “an unfair discriminatory practice for any individual who participated in the *alleged* discrimination as an. . . employer. . . to intentionally engage in any reprisal against any person because that person: (1)

opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.” Minn.Stat. § 363A.15 (1) (emphasis added). “Reprisal” by an employer is broadly defined 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.

In this case, Bahr alleged she was repeatedly told by Capella to treat her African-American subordinate LA, differently from her white subordinates in the terms and conditions of employment. Specifically, Capella directed Bahr to not engage in performance criticism or place LA on a performance improvement plan because she had a history of race issues. Bahr specifically told her employer that the actions it wanted her to take constituted discrimination on the basis of race against LA *and* her non-African American co-workers. Bahr refused to participate in the discriminatory conduct. And, just weeks later, she was fired.

The issue to be decided in this case is what constitutes “a practice forbidden under this chapter?” According to the plain language, a practice (or “type of practice”) that is enumerated by the Act as forbidden is a practice forbidden under the Act. An alternative interpretation includes a practice that is enumerated by the Act as forbidden and one that the employee has a good faith reasonable belief is forbidden (“good faith”). The court of appeals held that a forbidden practice is one the employee believes in good faith is forbidden. The court of appeals found

this interpretation to be consistent with and supported by the language of the Act, its policy, intent and purpose, the Department of Human Rights application of the Act and case law.

Capella, on the other hand, contends that the MHRA's retaliation provision only protects employees who oppose practices that meet the prima facie elements. Neither the MHRA and nor any of the hallmarks of statutory interpretation support Capella's argument.

The "type of practice" or "good faith" standard which was applied by the court of appeals, are supported by the language of the MHRA and all relevant and persuasive resources of statutory interpretation.

A. The Plain Language of the MHRA Prohibits an Employer from Retaliating Against Employees Who Oppose a Type of Practice Forbidden or Who Have a Good Faith Reasonable Belief the Practice is Forbidden

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn.Stat. § 645.16 (2009). "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. The words of the MHRA—"opposing a practice forbidden under this chapter"— in their application to this case are free from ambiguity. As the court of appeals held, Bahr opposed discrimination based on race. (A.269.) She complained to HR and her supervisor that she believed that their refusal to implement a PIP to assist LA in improving her job performance constituted race-

based discrimination. (*Id.*) HR had not resisted placing other employees on PIPs. (*Id.*) HR also commented to Bahr that LA had a history of “race” issues with Capella. (*Id.*) Bahr complained that the process Capella required her to implement for LA was not “equitable” and failed to treat LA like all the other employees. (*Id.*) The court of appeals correctly held that Bahr’s complaint sufficiently pled facts that she opposed Capella’s differential treatment based on LA’s race- a practice forbidden under the MHRA. (*Id.*); Minn.Stat. § 363A.08, subd.2(3) and Minn.Stat. § 363A.03, subd.13.

When an employee is required to allege a type of practice that is prohibited by the Act, the plain language of the Act is applied and it is consistent with the intent and purpose of the MHRA. *See Infra Section II B.* Furthermore, it gives effect to all provisions of the MHRA, including the legislature’s stated policy to eliminate discrimination from the workplace and its mandate to construe the Act liberally to effectuate that purpose. Minn.Stat. § 363A.02, subd.1(a)(1); Minn.Stat. § 363A.04.

Bahr recognizes that the words of the MHRA have been read to protect an employee who has a reasonable good faith belief that the practice she opposed is a forbidden practice. This, like the first interpretation, is consistent with the Act’s language, because a plaintiff who has a reasonable, good faith belief that practice 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). While “good faith reasonable belief” is not

actually written in the Act, for purposes of statutory interpretation, applying it is consistent with canons of construction. Minn.Stat. § 645.18. (“Words and phrases may be added in the construction of a statute where they do not conflict with the purpose or intent of the Act and do not affect its scope and operation.”)

With two arguably reasonable interpretations of the Act’s language and Capella’s interpretation, this Court may determine that the plain language of the Act is ambiguous. *See* Minn.Stat. § 645.17 (1). If there is ambiguity, the legislative intent behind the MHRA must be examined. Minn.Stat. § 645.16. When the legislature’s intent is examined and applied, it is clear the MHRA’s retaliation provision was meant to stop employers from punishing employees who complain of a type of practice forbidden or a practice an employee has a good faith reasonable belief is forbidden under the Act.

B. Legislative Intent Mandates Prohibiting Retaliation Against Employees Who Oppose a Type of Practice Forbidden or Who Have a Good Faith Reasonable Belief the Practice is Forbidden

The legislature’s intent may be ascertained by considering, the occasion and necessity for the law, the mischief to be remedied, the object to be obtained consequences of a particular interpretation and administrative interpretations of the statute. Minn. Stat. 645.16 (1), (3), (4), (6) and (8). All of these factors support either the “type of practice” or “good faith” standard.

1. The Necessity and Objective of the MHRA: Ensuring Freedom From Discrimination in the Workplace

The Legislature made clear that the overall necessity for the MHRA is to rid the workplace of discrimination. Minn.Stat. § 363A.02, subd. 1(a)(1).

Discrimination 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).

Acknowledging the importance of this privilege, the legislature recognized the opportunity to obtain employment without such discrimination as a civil right.

Minn.Stat. § 363A.02, subd.2. As a final punctuation to its message of eliminating discrimination, the legislature mandated a broad and liberal interpretation of the MHRA. Minn.Stat. § 363A.04. All these factors make clear that the legislature intended the MHRA, including the retaliation provision, to cast a wide net to protect and ensure freedom from discrimination for all employees.

As the court of appeals held, to accomplish this purpose, the retaliation provision is clearly focused “upon an *employer’s actions taken to punish an employee who makes a claim of discrimination.*” (A.263); *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005) (emphasis added). The Act explicitly places its focus on the employer, stating it is an unfair practice for an “employer” to engage in any reprisal. Minn.Stat. § 363A.15. Focus on the employer’s conduct, rather than on the legal merits of the employee’s complaint, is also the best way to effectuate the Act’s language and the legislature’s intent to rid the

workplace of discrimination. The employer is responsible for and controls the environment and conduct in the workplace. Therefore, focus on ways the employer can be encouraged to operate its workplace consistent with, or discouraged to operate inconsistent with, the MHRA will have the most impact on the workplace environment.

Effective enforcement of the MHRA and its objectives can be accomplished with the cooperation of employees who feel free to approach management with their complaints. *See Burlington N. & Santa Fe Ry. Co., v. White*, 548 U.S. 53, 68 (2006) (internal citations omitted) (“The anti-retaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms.”) In fact, in some sexual harassment cases, an employee’s report of inappropriate conduct to the employer may be a requirement to trigger the employer’s duty to act. The *Ellerth/Faragher* defenses, recognized by this court just last year, in essence, impose a duty on an employee to report harassing and offensive conduct to her employer. *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558 (2008) (recognizing defense based in part on employee’s *unreasonable failure* to complain.). Therefore, employees are compelled to report conduct but with the assurance that the anti-retaliation provision will provide the employee protection. This is consistent with the MHRA’s primary objective of eliminating discrimination rather than redressing it. Minn.Stat. § 363A.02, subd.1(a) (purpose is to rid the workplace of discrimination). Furthermore, because of the cumulative nature of harassment claims, “[b]oth 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.” *Hanlon v. Chambers*, 464 S.E.2d 741, 754 (1995).

To apply a standard that limits protection only to those employees who oppose actual discrimination would chill legitimate opposition and pay mere lip service to the legislature’s intent and would leave a large class of employees stripped of the Act’s protection to report at their own peril. See (A.267.) Such an absurd result is antithetical to the plain language of the MHRA and its objectives.

2. The Type of Practice or Good Faith Standards Favor Public Interests and are Reasonable Interpretations of the MHRA

The type of practice or good faith standards are further supported by the presumption that the legislature intends to favor public interests rather than private interests. Minn.Stat. § 645.17 (5). Either standard favors public interests because employees are provided greater protections for opposing discriminatory practices, and presumably help create more desirable work environments, rather than insulating employers from any liability. The actual violation standard, however, permits an employer to ignore discriminatory and harassing conduct unless or until it becomes an unmanageable and costly crisis.

These standards also lead to a reasonable interpretation of the MHRA. Minn.Stat. § 645.17 (1) (presuming legislature intends a reasonable result.) 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.

Furthermore, to apply a more stringent standard for employees who oppose conduct directly to their employer is unreasonable. Employees who engage in opposition directly with their employer are arguably in more need of protection from reprisal since no one else is aware of their conduct. Moreover, 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. Courts and presumably employers would want to encourage employees to make a complaint directly to them rather than publically to a third party of governmental agency. *See Id.* (“The resolution of such charges without governmental prodding should be encouraged.”)

The necessity for the MHRA and the menace it was intended to remedy, coupled with the presumptions of statutory construction, all evince the legislature’s intent favors the type of practice or good faith standard. The good faith standard is also consistent with that applied by the Department of Human Rights.

3. The Minnesota Department of Human Rights Applies the Good Faith Standard

The Department of Human Rights is the State agency responsible for enforcing the MHRA and its Commissioner has made clear that the Department applies the good faith standard. (A.197-218.) Consistent with the rules of statutory construction this Court recognized just last year, 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); Minn.Stat. § 645.16(8).

The EEOC, the federal agency responsible for enforcing Title VII, also applies this standard. See *EEOC Compliance Manual*, Retaliation, Section 8 – II (B)(3)(b) (1998), www.eeoc.gov/policy/docs/retal.html.

C. State and Federal Case Law Support the Type of Practice or Good Faith Standard

1. Minnesota State Courts Apply the Reasonable Belief Standard

Consistent with the principles set forth above, the Minnesota Court of Appeals in this case and others apply the reasonable belief standard. In *Jones v. Minneapolis Public Schools*, No. C1-02-1523, 2003 WL 1962062 (Minn.App. Apr. 29, 2003), the court of appeals reversed the district court's order granting summary judgment because to raise a question of fact, the plaintiff needed only to establish a good faith, reasonable belief that defendant was engaging in illegal discrimination. *Id.* at *3. The court of appeals further noted that determining whether good faith exists is typically a question of fact for the jury. *Id.*

Similarly, in *Loew v. Dodge County Soil and Water Conserv. Dist.*, No. A05-1574, 2006 WL 1229641 (Minn.App. May 9, 2006), applying the good faith standard, the court of appeals reversed the district court's order granting summary judgment. *Id.* at *8-9. While simply "claiming" a belief is not sufficient, it was error to fail to consider whether the plaintiff had a good faith reasonable belief that she was opposing an illegal practice. *Id.* at * 8.

In *Potter v. Ernst & Young, LLP*, 622 N.W.2d 141 (Minn.App. 2001), plaintiff alleged race and disability discrimination and retaliation. Plaintiff alleged that after he was assigned a new counselor/supervisor, his opportunities with the employer decreased. Plaintiff alleged that his counselor, who was supposed to advocate for plaintiff and his advancement, did nothing. Plaintiff ultimately

complained he believed the treatment was based on race and disability. Three months after that complaint, plaintiff was terminated. Plaintiff only appealed the dismissal of his retaliation claim. The district court and court of appeals both found the plaintiff had engaged in statutorily protected conduct- even though the claims underlying the plaintiff's opposition failed. *Id.* at 145. Other courts have made similar findings. *See State v. Wallin D.D.S.*, No. C8-96-1542, 1997 WL 53016 (Minn.App. Feb. 11, 1997) (relying on good faith standard to reverse lower court's determination that underlying violation must be an actual violation); *Olchefski v. Star Tribune*, CX-94-1988, 1995 WL 70190 *3 (Minn.App. Feb. 21, 1995) (citing *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590 (8th Cir. 1988) (“[r]eprisal claims survive even if the underlying conduct which the plaintiff opposed was not illegal.”))

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 applied a similar standard. *See McCabe v. Board of Johnson County Comm'rs*, 615 P.2d 780 (Kan. App. 1980); *Wolfe v. Becton Dickinson & Co.*, 662 N.W.2d 599, 605 (Neb. 2003); *Carmona v. Resorts Int'l Hotel*, 915 A.2d 518, 528-30 (N.J. 2007); *Cox v. Smith Inc.* 974 S.W.2d 217 (Tex.App.1998); *Viktron/LIKA v. Labor Commission*, 38 P.3d 993, 996 (Utah App. 2001); *Conrad v. Szabo*, 480 S.E.2d 801, 814-15 (W.Va. 1996) (same); *Hanlon v. Chambers*, 464 S.E.2d 741, 754 (W.Va. 1995)).

Federal courts have long applied the good faith standard as well.

2. Federal Courts Support the Good Faith Standard

Federal courts analyzing Title VII's³ retaliation provision afford protection to employees who oppose a practice that is not an actual violation but one that they have a good faith reasonable belief is a violation. "When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII" *Hearth v. Metropolitan Transit*, 436 F.Supp. 685, 689 (D.Minn. 1977). To hold otherwise would leave employees unable to complain of discrimination without fear of reprisal if the conduct was not a violation. *Id.*

The Eighth Circuit has continued to apply and build upon this reasoning in reversing several decisions where lower courts essentially required the practice opposed be an actual violation. For example, in *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989), the plaintiff alleged age discrimination and retaliation, under the ADEA. The plaintiff was hired at age fifty-nine and terminated at age sixty-two. *Id.* at 1153-55. During the last few months of employment, the plaintiff was twice placed on probation for performance issues. He then complained he was being treated differently than his younger co-workers and notified his employer he had talked with an attorney. *Id.* at 1154. Plaintiff

³ "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).

was fired the next day. *Id.* Plaintiff only appealed the dismissal of his retaliation claim. The Eighth Circuit reversed the order granting summary judgment which was based on the fact that the plaintiff did not establish the underlying conduct constituted discrimination. *Wentz*, 869 F.2d at 1155 (quoting *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir.1988) (“[t]o prove that he engaged in protected activity, [Wentz] need not establish that the conduct he opposed was in fact [discriminatory].”). Therefore, the Court held that even though the plaintiff’s discrimination claim was unsuccessful, it did not preclude him from pursuing his retaliation claim. *Id.* at 1155.

In *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 714 (8th Cir. 2000), the plaintiff alleged wage discrimination and retaliation. The retaliation claim was based on the plaintiff’s complaint about comments her supervisor had made to her. The district court dismissed both claims. The court of appeals reversed, holding that a jury could find the plaintiff had a good faith reasonable belief that *at least one* comment made by her supervisor- “women didn’t belong in the coal industry”- violated the law. *Buettner*, 216 F.3d at 714. The court of appeals did not determine whether the underlying conduct was an actual viable claim of discrimination: “[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.” *Id.* at

714-15; *Foster v. Time Warner*, 250 F.3d 1189, 1195 (8th Cir. 2001) (finding protected activity without analysis of viability of underlying claim).

More than supporting the good faith standard, the Eighth Circuit has rejected the actual violation standard as unfairly burdening the employee with the job of knowing the evolving standards of what constitutes discrimination.

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

Thus, in *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005), the court found the age based comments, including use of the term “old lady” and “training old ladies is hard” insufficient to establish an actionable hostile environment. But, the court was not convinced plaintiff’s belief the conduct was a violation of the law to be unreasonable. *Peterson*, 406 F.3d at 525 at n.3; see also *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005) (affirming dismissal of age discrimination claim where no evidence relating plaintiff’s age to employer’s actions but reversing dismissal of retaliation claim based on complaints of age discrimination.)

Finally, and more recently, in *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112 (8th Cir. 2006), the plaintiff’s sexual harassment claim was essentially based upon four incidents involving her supervisor showing her sexually inappropriate

cartoons and making comments about her body. *Wallace*, 442 F.3d at 1114. Consistent with its earlier decisions, the court held that even though the reported conduct may not have constituted harassment under the law, the report was sufficient to support a claim of retaliation. *Id.* at 1118; see also *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 190, 195-96 (7th Cir.1994) (finding employee had reasonable good faith belief of Title VII violation where supervisor apologized for one time use of racial epithet.). The majority of other circuits apply a similar standard. See (A.263-264.)

In summary, under the federal standard, “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 at 1036. Therefore, 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; *Van Orden v. Wells Fargo Home Mortg., Inc.* 443 F.Supp.2d 1051 (S.D. Iowa 2006); *Jackson v. City of Chicago*, No. 96-C-3636, 1996 WL 734701 at *4-5(N.D.Ill. Dec. 18, 1996) (“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.”)

For purposes of analyzing and determining the standard of liability for retaliation under the MHRA, Bahr relies, in part, on the principles set forth in Title VII case law but does not defer to them entirely recognizing this Court is not necessarily bound by federal interpretations because “discrimination liability, and

its consequences, is more onerous under [the MHRA] than under Title VII.”

Carlson v. Independent School Dist., 623, 392 N.W.2d 216, 220-21 (Minn.1986).⁴

Thus, this Court has refused to follow federal law construing Title VII, in whole or in part, where it would conflict with this principle. See *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 573 (2008) (refusing to follow narrower federal definition of “supervisor” because “we have consistently held that the remedial nature of the [MHRA] requires liberal construction of its terms.”); *Ray v. Miller Meester Advertising, Inc.*, 684 N.W.2d 404, 408-09 (Minn.2004) (refusing to follow federal rule that front pay may not be multiplied); *Cummings v. Koehnen*, 568 N.W.2d 418, 422-23 (Minn.1997) (refusing to follow federal rule regarding treatment of sexual harassment).⁵ And, this Court may do so here, as the MHRA’s retaliation provision is broader than Title VII’s. The MHRA, unlike Title VII, defines “reprisal” and does so liberally: “reprisal” by an employer is includes “any form of intimidation, retaliation or harassment,” including “depart[ure] from any customary employment practice or assignment to a lesser position in term of wages, hours, job classification, job security or other employment status.” Minn.Stat. § 363A.15. Other portions of the both statute’s retaliation provisions are similar, however. Therefore, Bahr relies on and refers

⁴ For example, the MHRA imposes liability or more onerous standards of liability based on age, marital status and sexual orientation. Minn.Stat. §§ 363A.03, subd.2; subd. 24; subd. 44; 363A.08, subd.2(3).

⁵ Respondent is not aware of this Court ever interpreting or applying a less onerous standard of employer liability under the MHRA than Title VII.

this Court to Title VII case law as a guide in ascertaining the appropriate standard to be applied under the MHRA but in a manner consistent with the principal that “discrimination liability, and its consequences, is more onerous under [the MHRA] than under Title VII.” *See infra Section III C.*

III. THERE IS NOTHING IN THE MHRA THAT SUPPORTS THE ACTUAL VIOLATION STANDARD

The actual violation standard is not supported by the language of the MHRA, its policy, the MDHR interpretation of the Act or case law construing it. Therefore, Capella concocts support for its standard through other resources. Capella relies on: (1) its interpretation of the “plain language” of the MHRA; (2) its spin on legislative intent; (3) alleged differences between the MHRA and Title VII; (4) the Whistleblower Act; and (5) its interpretation of case law. But these resources all fail to provide any support.

A. The Actual Violation Standard Defies the Plain Language of the MHRA

The MHRA’s retaliation provision states that an employer is prohibited from retaliating against an employee because they “oppose a practice forbidden under [the Act].” The provision also specifically contemplates “*alleged* discrimination” not actual discrimination. *See* Minn.Stat. § 363A.15 (emphasis added). Nevertheless, Capella argues “opposing a practice” means the employee alleging retaliation must also allege or prove that the underlying conduct opposed was in fact a violation, meeting the prima facie elements, in addition to establishing a claim of retaliation. Thus a plaintiff would be required to establish

a case within a case. Even if this meaning is within the plain language of the statute, for purposes of statutory construction, the inquiry does not end because: “It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because it is not within its spirit or not within the intention of its makers.” *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

Therefore, even if this Court were to find the standard offered by Capella to be in the letter or literal words of the statute it is not “within the statute” because it is contrary to the Act’s explicit purpose and legislative intent. *See supra Section II B.*

B. The Actual Violation Standard is Inconsistent with Legislative Intent

Capella urges this Court to ignore the legislature’s intent, claiming the text of the statute is not ambiguous or susceptible to more than one reasonable meaning. As already addressed, *Supra Section II A*, the text of the statute is susceptible to two other reasonable meanings which mandates consideration of the legislature’s intent. Minn.Stat. 645.16; *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn.1999). Even considering the legislature’s intent, Capella still urges this court to ignore every hallmark of statutory construction to determine the intent. Finally, relying on other “similarly” worded statutes, Capella argues if the legislature intended the words “good faith” to be applied in the MHRA they could have said so. These arguments defy the rules of statutory construction and are riddled with inconsistencies.

Every resource available for ascertaining legislative intent leads to the undisputed conclusion that the legislature intended to protect employees who oppose a practice that is a type of practice prohibited by the Act or that the employee had a reasonable good faith belief was a violation of the MHRA. *See supra Section, II.*

Unable to refute the legislature's intent, Capella simply ignores it and flips it around to argue that the legislature's real intent was to protect employers against "wholly unfounded" charges. *See* Minn.Stat. § 363A.02 Subd.1(b) ("it is also the public policy of this state to protect all persons from wholly unfounded charges of discrimination.") Based on this interest, Capella argues that the legislature's intent was to only protect employees who opposed a practice that is in fact a violation of the Act. Put another way, Capella's interpretation means the legislature intended to permit employers to retaliate as long as the underlying conduct did not ripen into actionable conduct. Capella's argument fails. It ignores the plain meaning of the language upon which its argument relies ("wholly unfounded"). Furthermore, it fails to give meaning to all provisions of the MHRA. Finally, it leads to several absurd results.

While the MHRA does express an interest to protect against charges of discrimination its interest is only in protecting against "wholly unfounded" charges. Neither "wholly" nor "unfounded" are defined by the Act, so their plain and ordinary meaning applies. Minn.Stat. § 645.08(1). "Wholly" means "completely; entirely" and the plain meaning of "unfounded" is "[n]ot based on

fact or sound observation.” (A.266.) (citing *American Heritage Dictionary*, 2039 (3d ed. 1992)). Protection against entirely baseless charges does not evince the intent to permit employer’s to retaliate unless the employee opposes an actual, prime facie, violation of the Act.

The “wholly unfounded” language also does not mean it protects against any charge, but only entirely baseless charges. And, while Capella claims this policy interest must only be given “some” effect, its arguments belie that assertion. In reality, Capella argues this interest trumps all others. But, to argue that the policy of protecting against “wholly unfounded” charges operates in a way to eviscerate other long standing principles of the MHRA is illogical. These words (“wholly unfounded”) have existed in the MHRA since it was enacted and have not done anything to affect this Court’s liberal and broad interpretation of the Act.⁶ Bahr argues the interest of eliminating discrimination in the workplace is primary to the “wholly unfounded” interest of the MHRA. But, even if it’s not, at a minimum, the Act would afford both policy interests *equal* reverence. One does not trump the other. Capella’s interpretation also does not give meaning to all the Act’s provisions.

When all the provisions of the MHRA are considered, it is clear that the legislature intended to protect the largest number of employees it could from retaliation. At the same time, the Act ensures that those who report or oppose discriminatory practices have some basis for doing so. These interests are both

⁶ Minn.Stat. § 516 (1) (1955).

effectuated by protecting employees who oppose practices that are of a type forbidden or who believe in good faith was forbidden by the MHRA. In either case, the employee has made a claim with a sound basis even when the conduct opposed is not an actual violation of the Act. That employee has *not* made a *wholly unfounded* claim. Therefore, contrary to Capella's argument, dismissing a retaliation claim because the underlying conduct is not an actual violation does not promote the MHRA's policy interest of protecting against *wholly unfounded* claims.

The actual violation standard and Capella's arguments in support of it also create several absurd results. First, by subverting the legislature's clear intent to eliminate discrimination to the interest of protecting against any charge of discrimination that does not meet the prima facie elements leaves employees in a Catch-22. 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). An employee is compelled to report the conduct immediately with the assurance that the anti-retaliation provision will provide the employee protection. Under Capella's standard, 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.

Moreover, the actual violation standard leads to the absurd result of working to discourage 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.”) This is precisely what the retaliation provision was designed to prevent.

Providing protection to only those employees who complain of conduct that is an actual violation of the MHRA also leads to the unreasonable result of requiring employees (or employers) to make snap judgments about the legal merit of conduct that sometimes takes judges and lawyers years to unravel. The type of conduct or 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 wholly unfounded or made in bad faith.

Finally, as further proof that the legislature could not have intended to protect against opposition based on a reasonable good faith belief, *Capella* refers to Minn.Stat. § 181.932 and Minn.Stat. §626.557. *Capella* argues, unlike these statutes, the legislature did not put “good faith” into the MHRA and we should not “engraft” it into the Act. As the court of appeals explained, however, this argument 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. (A.264-265.) The MHRA was enacted in 1955⁷ 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). Minn.Stat. § 626.557⁸ and Minn.Stat. 181.932⁹ were enacted in 1986 and 1987, respectively. Each specifically included “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, even when the retaliation provision was amended, since it was already logically being interpreted to include that language.

C. The Differences Between Title VII and the MHRA Do Support Application of the Type of Practice or Good Faith Standard

At several points in its argument, Capella urges this Court to not follow federal Title VII case law applying the good faith standard because Title VII and the MHRA are different. The parties agree Title VII and the MHRA are different. But, Capella ignores the fact that in over fifty years of state case law, Minnesota courts have made clear that the difference is the fact that the MHRA is *broader* and imposes more onerous liability standards on employers than Title VII.

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

For example, citing *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn.1997) and *Carlson v. Independent School District No. 623*, 392 N.W.2d 216 (Minn.1986), Capella argues this Court has refused to follow federal cases interpreting Title VII because of the differences between the two Acts and should do so here. This Court did refuse to follow federal Title VII law when interpreting the MHRA in *Cummings* and *Carlson* - but did so because “the scope of discrimination liability, and its consequences, are more onerous” under the MHRA than Title VII. *Carlson*, 392 N.W.2d at 221. Therefore, *Cummings* and *Carlson* actually support the adoption of a liability standard that is more onerous on an employer than the good faith standard (like the type of practice standard). Especially, when as here, the MHRA’s retaliation provision is broader than Title VII’s. *See supra Section II C(2)*.

Capella also attempts to place significance in the fact that the administrative procedures under Title VII and the MHRA are different. Capella points out that, unlike Title VII, a plaintiff under the MHRA may proceed directly to district court by-passing the administrative process. Minn.Stat. § 363A.33, subd.1. Being able to by-pass the administrative process means an MHRA plaintiff skips the “screening” process performed by the Commissioner “to make an immediate inquiry when it appears that a charge of [unfair discriminatory practice] is frivolous or without merit.” (A.209.) Capella’s distinction is one without a difference. Neither administrative process has an ultimate effect on the employee’s right or ability to bring a civil case, except to perhaps delay the civil

filing of the federal claim. And, contrary to any implication made by Capella, the EEOC's administrative process (and the MDHR's for that matter) is not designed to ferret out or "screen" cases. *Appellant's Br.*, at p.27. Instead, the purpose is to promote simple and expeditious conflict resolution through conciliation rather than litigation. See *McCarthy v. Cortland County Community Action Program, Inc.*, 487 F.Supp. 333, 339 (1980); *Grandillas v. Hughes Aircraft Co.*, 407 F.Supp. 865 (D. Ariz. 1975). Capella's arguments are pure sophistry.

Next, Capella contends that because Title VII is so different from the MHRA, this Court should look to the Whistleblower law for guidance.

D. The Whistleblower Act Does Not Support the Actual Violation Standard- It is a Different Statute, Addresses Different Wrongs and Provides Less Protection Than the MHRA

Capella's arguments fail on all fronts. The plain language of the MHRA does not support the actual violation standard. Neither do legislative intent or agency interpretation. State and federal case law don't support it either. Title VII, the MHRA's most analogous counterpart, also fails to provide any support. Therefore, left with no persuasive or applicable resource of statutory construction, Capella attempts to conjure support from the Whistleblower Act.

The MHRA and MWA are very different statutes. For example, the legislature *mandates* that the MHRA be liberally construed. Minn.Stat. § 363A.04. Conversely, this Court has recently cautioned *against construing the MWA "too broadly."* *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 22 (Minn. 2009) (citations omitted). Unlike the MWA, the legislature made clear that

the liberal policy behind the MHRA was to make sure discrimination was eliminated from the workplace and states a claim under the Act is a civil right. The rights provided under the MHRA are so significant the MHRA operates at the exclusion of the MWA. Minn.Stat. § 363A.04. The MHRA also covers not just those who engage in unfair employment practices but also those who aid or abet, or *attempt* to aid or abet, a person to engage in any practice forbidden by the Act. Minn.Stat. § 363A.14 (1) and (2)(emphasis added). It provides broader damages, including injunctive relief, a civil penalty and a multiplier. Minn.Stat. § 363A.29, Subds.3-6. The Act's retaliation provision is similarly broad providing protection for those associated with protected groups. Minn.Stat. § 363A.15 (2). The MHRA and MWA are simply not analogous. They are focused on different wrongs and designed to protect different rights. Accordingly, reliance on case law construing the MWA is inapplicable and entirely unpersuasive.

IV. UNDER THE MHRA THE GOOD FAITH STANDARD INCLUDES SUBJECTIVE AND OBJECTIVE COMPONENTS

If this court adopts the good faith standard, it should include a subjective and objective component. The subjective component would involve inquiry into whether the plaintiff subjectively, or in good faith, believed the practice was forbidden under the Act. The objective component would determine and ensure the conduct the employee complained of is a type of practice forbidden by the Act (e.g., race, gender, disability). These components serve the language, intent and purpose behind the Act. To ensure the employee is indeed opposing forbidden

conduct, they must oppose a type of practice covered by the Act. This, coupled with a subjective good faith belief the conduct is forbidden, will ensure the opposition has a sound basis and is not “wholly unfounded.” This standard will encourage employees to oppose discrimination or harassment promoting the MHRA’s intent to rid the workplace of discrimination.

To require anything more, like Capella’s “applicable substantive law” standard would essentially require all employees to be lawyers or at least be familiar with the changing standards in discrimination case law. But of course, this is not the case. And, nothing in the MHRA indicates the legislature intended the absurd result of leaving such a large class of employees unprotected.

Cummings v. Koehnen, 568 N.W.2d 418, 422-23 (Minn.1997).

This standard also defies the liberal and remedial interpretation this Court has consistently applied to claims under the MHRA. As noted earlier, this Court has refused to follow federal precedent where to do so would violate the language and the legislature’s mandate by imposing a more onerous standard on employees or a less onerous standard of liability on employers. But that is how this standard operates.

Capella and the cases it relies upon recognize that the employee does not have to establish the underlying claim is unlawful and at the same time, it argues for a standard that requires the same. *Brannum v. Missouri Dept. of Corrections*, 518 F.3d 542 (8th Cir.2008), relied heavily upon by Capella, is a prime example. In *Brannum*, the court of appeals affirmed summary judgment because no

reasonable person could have believed the underlying conduct constituted sexual harassment or disparate treatment. *Brannum*, 518 F.3d at 548-49. The court held that no reasonable person could have believed the conduct constituted disparate treatment because no adverse action occurred. *Id.* at 549.¹⁰ Although the court's holding was phrased in terms of a "reasonable person's belief," it required the plaintiff to show the prima facie elements of the underlying conduct to establish an objectively reasonable belief.¹¹

Brannum is contradictory to the majority of circuit case law, including the Eighth Circuit. For example, in *Peterson v. Scott County*, 406 F.3d 515, 525 at n.3 (8th Cir. 2005), the district court dismissed plaintiff's retaliation claim because "no reasonable person could have found that the comments [the plaintiff] complained of created a hostile environment." In so doing, the district court relied on *Curd v. Hank's Disc. Fine Furniture, Inc.*, 272 F.3d 1039, 1041 (8th Cir. 2001). The court of appeals reversed and criticized the district court's "over broad" reading of *Curd*

¹⁰ Similarly, in *Talanda v. KFC National Management Co.*, 140 F.3d 1090 (2d Cir. 1998), cited by Capella, while the court noted that "good faith and reasonableness, not the fact of discrimination," is the "critical inquiry", it granted defendant's summary judgment motion because plaintiff couldn't show the person he complained on behalf of had a disability that affected a "major life activity." *Talanda*, 140 F.3d at 1097-98.

¹¹ In support of this standard, the court of appeals in *Brannum* cited *Clark County School Board v. Breeden*, 532 U.S. 268 (2001). *Clark*, like *Brannum*, however, is procedurally distinct as it was also 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 hold that the good faith standard applied to Title VII or that, as a matter of law, the underlying conduct should be measured by the "applicable substantive law."

to reach its decision. *Peterson*, 406 F.3d at 525 at n.3.¹² The court in *Peterson*, like the court of appeals in this case, recognized that applying such a standard unfairly requires employees to understand and know the evolving and intricate standards of liability under Title VII. (A.271.); *Crumpacker v. Kansas Dep't of Human Res.*, 338 F.3d 1163, 1172 (10th Cir. 2003). This reasoning in *Peterson* is not only consistent with the prevailing standard but it is consistent with the MHRA's liberal protections and legislative intent. *Brannum* is not.

Therefore, if this Court determines the good faith standard applies, Bahr urges this Court, as it did in *Frieler*, to use federal Title VII case law as a guide but to create a standard that is consistent with the language and liberal intent behind the MHRA. *See supra Section II C(2), III*. The standard set forth in *Brannum* is not such a standard. The appropriate standard is that set forth by Bahr.

Capella cites a string of non-binding federal cases in support of its argument that the objective reasonable belief standard should be based on applicable and substantive law. These cases are distinct on several levels and are unpersuasive. With the exception of one, all are from foreign jurisdictions. All were decided at the summary judgment stage. The cases are also factually distinct. In *Butler v. Alabama Dept of Transportation*, 536 F.3d 1209 (11th Cir. 2008), the underlying conduct (race harassment) was based on a comment that was

¹² Interestingly, *Curd* cited and relied on *Clark County School v. Breeden*, 532 U.S. 268 (2001). Nevertheless, the Eighth Circuit rejected its reasoning.

not made in the workplace, the plaintiff admitted it was not directed at her and did not allege it created a hostile environment. The facts in *Clover v. Total System Serv., Inc.*, 176 F.3d 1346 (11th Cir.) are similarly suspect. The underlying practice (sexual harassment) was based upon plaintiff's belief that the conduct was "flirtatious," the supervisor's position of authority and the age difference between the supervisor and other employee. Even if the "applicable substantive law" standard did apply, the facts of these cases, unlike this case, would not withstand the good faith analysis. *Butler*, 536 F.3d at 1213-14 (conduct did not come "close"); *Clover*, 176 F.3d at 1351 (conduct was "off by a country mile").

Curiously, Capella also cites *Udoeyop v. Accessible Space Inc.*, No. 08-4743, 2008 WL 4681389 (D.Minn. Oct. 21, 2008). This case actually supports Bahr's standard as the plaintiff's retaliation claim failed because the applicable substantive law- which was the MHRA and Title VII- did not protect discrimination based on citizenship. *Udoeyop*, 2008 WL 4681389 at *3-4.

Similarly unpersuasive are the cases cited by Capella that it claims were dismissed based on the "applicable substantive law" standard. But, this contention is not supported. In *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125 (2d Cir. 1999), the court recognized the plaintiff did not have to prove the underlying conduct was an actual violation but dismissed the case because the claim did not involve race discrimination in the employment context. *Wimmer*, 176 F.3d at 135-36.

In *Parker v. Otis Elevator Co.*, No. 99-17449, 2001 WL 502008 (9th Cir. May 10, 2001) the court held that whether the conduct was prohibited by Title VII or not does not matter since all the plaintiff had to show that he “reasonably believed that the employment practice was in fact illegal.” *Parker*, at *1. Similarly inapplicable is *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000) where the Seventh Circuit applied a broader standard than the “substantive and applicable law” standard. Describing the reasonable belief standard, the court stated “[t]hat means, for example, that even if the degree of discrimination does not reach a level where it affects the terms and conditions of employment, if the employee complains and the employer fires him because of the complaint, the retaliation claim could still be valid.” *Hamner*, 224 F.3d at 707. The only requirement the court placed on the opposition and the plaintiff’s reasonableness, is what Bahr asks this court to require: that the complaint must involve a type of discrimination prohibited by Title VII. *Id.* at 704.

Even if this Court were to adopt the “applicable and substantive law” standard, it could not do anything to disturb the court of appeals judgment to reverse the dismissal of her case. In order to determine whether Bahr’s belief was reasonable, even in light of applicable law, the record must be more fully developed. There has been no discovery in this matter. Only discovery can reveal whether adverse action was taken against LA and/or her peers or whether or how Capella’s own handbook or training described discrimination, or required

reporting. Finally, the determination of good faith is a question of fact that cannot be determined at summary judgment, much less on a motion to dismiss. *City of Otsego v. Cokley*, 623 N.W.2d 625, 630 (Minn.App. 2001).

V. BAHR PREVAILS UNDER ANY STANDARD

No matter which of the three standards is applied to the facts alleged by Bahr in her Complaint, she has sufficiently plead a claim of retaliation.

A. Bahr Prevails Under the Type of Practice or the Good Faith Standard

Bahr opposed race discrimination. She alleged Capella discriminated against LA by failing to provide her the equal employment opportunities because of her race. See Minn.Stat. § 363A.08, subd. 2(3). Bahr sufficiently alleged opposition to a type of practice (race discrimination) forbidden by the MHRA. This standard imposes liability on an employer who punishes an employee who alleges discrimination or harassment that is of a type prohibited by the Act.

In the alternative, liability may be imposed when adverse action is taken against an employee because she complained of a practice she had a good faith reasonable belief is a violation of the Act. As discussed above, and as decided by the court of appeals, Bahr sufficiently pled such a claim. This sound and reasonable legal principle has been in effect in federal courts for over thirty years.

Either standard meets the primary purposes of the MHRA. By providing protection for opposing conduct that is of the type or that the employee believes in good faith is of the type forbidden by the Act, the MHRA encourages employees

to report discrimination not only for their own protection but for the protection of co-workers thereby ridding the workplace of discrimination. Furthermore, both standards encourage prompt reporting with protection even when the conduct has not progressed to full blown harassment or discrimination. This standard provides employers the opportunity to “nip [the discrimination] in the bud” and lessen future liability. See *McCurdy v. Arkansas State Police*, 375 F.3d 762, 772 (8th Cir. 2004). At the same time, wholly unfounded claims would not be protected.

B. Bahr Prevails Under the Actual Violation Standard

Finally, Bahr prevails even if this court were to hold that a plaintiff has to show an actual violation that is objectively reasonable in light of the “applicable substantive law.” The court of appeals held that Bahr’s complaint sufficiently pled actionable discrimination. (A.269-273.) Capella’s directive to “move slowly” with LA and not implement an improvement plan denied LA, on the basis of her race, the same opportunities as other employees. (*Id.*) And, although not adopting the “applicable substantive law” standard the court held Capella’s discriminatory conduct would be included. (A.270-271.)

Specifically, the court of appeals cited to *Vaughn v. Edel*, 918 F.2d 517 (5th Cir.1990), where the Fifth Circuit held that an African-American employee presented direct evidence of discrimination where her employer initiated a “non-confrontation” policy for the employee to avoid a race discrimination suit. *Id.* at 522. By failing to criticize or counsel her on how to improve her work the court found the plaintiff was treated differently than other employees because of her

race. *Id.* at 522. The employer had denied the employee the same opportunities to improve her performance as it did white employees. This was discriminatory even where the court did not doubt that self interest, rather than race discrimination, motivated the employer's conduct. "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.* (citations omitted). Like the Court in *Vaughn*, the court of appeals correctly determined that Capella's directive to "move slowly" with LA and to not implement an improvement plan denied LA, on the basis of her race, the same opportunities as other employees. 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.

Capella attempts to distinguish *Vaughn v. Edel*, 918 F.2d 517 (5th Cir.1990) on the basis that, unlike LA, the plaintiff in *Vaughn* was given no warning about her performance. LA, Capella claims, was given notice and help.

The facts show, however, that Bahr wanted to provide LA with a proper Performance Improvement Plan 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 LA 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 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. *Id.* at 523.

To rebut this Capella relies on *Cullom v. Brown*, 209 F.3d 1035 (7th Cir. 2000).¹³ 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

¹³ The court in *Cullom* 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. The facts in this case are most akin to *Vaughn*. LA was not really informed of her performance and while she continued to be employed she was not provided the same opportunities to improve.

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 cites *Garrett v. Celanese Corp.*, No. 3:02-cv-1485, 2003 WL 22234917 (N.D.Tex. Aug. 28, 2003). 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.

CONCLUSION

For the reasons set forth herein, the decision of the Court of Appeals reversing the District Court's dismissal of Bahr's complaint should be affirmed and remanded for further proceedings in accordance with the type of practice or good faith standard.

Respectfully submitted,

Dated this 12th day of October, 2009

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STATE OF MINNESOTA

IN COURT OF APPEALS

Case No. A08-1367

Elen Bahr,

Respondent,

v.

**CERTIFICATE OF WORD COUNT
COMPLIANCE**

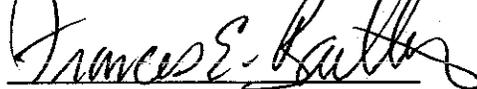
Capella University,

Appellant.

I, Frances E. Baillon, one of the counsel for Respondent, hereby certify that the word count of the herewith-filed Respondent's Brief complies with Rule 132.01, subd. 3(a) of the Rules of Civil Appellate Procedure. I certify that Microsoft Word 2003 word count function was applied and that this brief (exclusive of the cover and the pages containing the table of contents and table of authorities and this certificate) contains 13,735 words.

Dated this 12th day of October 2009.

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